(23,417)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 842.

JOHN A. JOHNSON, APPELLANT,

vs.

LUMAN T. HOY, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 9, 1912.

1 Pleas had at a Regular Term of the District Court of the United States for the Eastern Division of the Northern District of Illinois, begun and held in the United States Court Rooms in the City of Chicago, in the Division and District Aforesaid, on the first Monday of November (it being the fourth day thereof), in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States of America the 137th year.

Present the Honorable Kenesaw M. Landis and the Honorable George A. Carpenter, Judges of said Court presiding; Luman T. Hoy, United States Marshal for said District, and T. C. MacMillan, Clerk of said Court.

2 No. 31003.

THE UNITED STATES OF AMERICA ex Rel. JOHN ARTHUR JOHNSON
vs.
LUMAN T. HOY.

Be it remembered that heretofore, to wit, on the 9th day of November, A. D. 1912, there was filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, a Petition for Writ of Habeas Corpus in the above entitled cause; same being in the words and figures following, to wit:

3 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

UNITED STATES OF AMERICA ex Rel. JOHN A. JOHNSON
vs.
LUMAN T. HOY.

To the Honorable George A. Carpenter, one of the Judges of said District Court:

The Petition of John A. Johnson respectfully shows that he is now imprisoned and restrained of his liberty by Luman T. Hoy, United States Marshal for the Northern District of Illinois, at Chicago, in the County of Cook, in the State — Illinois; that your petitioner is thus imprisoned and held in custody under color of the authority of the Constitution and laws of the United States relating to certain crimes forbidden by an Act of Congress entitled, the "White Slave Traffic Act," approved June 25, 1910, in force July 1, 1910; that the said Luman T. Hoy claims to hold in custody and imprisonment your petitioner under and by virtue of a certain warrant or process, which said warrant or process was issued on the 7th day of November, 1912, upon an indictment returned by the grand jurors for the Northern District of Illinois, Eastern Division, in the

District Court of the United States, for the Northern District of Illinois, Eastern Division, on the 7th day of November, 1912, which said indictment is in words and figures as follows:

In the District Court of the United States of America for the Northern District of Illinois, Eastern Division, November Term, A. D. 1912.

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

The grand jurors of the United States of America, inquiring for the Eastern Division of the Northern District of Illinois, upon their oaths present that John Arthur Johnson, otherwise known as Jack Johnson, late of the city of Chicago, on, to wit, the tenth day of August, in the year of our Lord nineteen hundred ten, unlawfully and knowingly did cause to be transported in interstate commerce, that is to say from Pittsburgh, in the state of Pennsylvania, to Chicago, in the state of Illinois, through the said Eastern Division of the said Northern District of Illinois, over the railway route of a certain corporation common carrier, to wit, Pittsburgh, Ft. Wayne and Chicago Railway Company, a corporation under the laws of the state of Illinois, which corporation common carrier was then and there engaged in the transportation of persons by railroad over its railway route from Pittsburgh, in the state of Pennsylvania, to Chicago, in the state of Illinois, a certain girl, to wit, Belle Schreiber, otherwise known as Mrs. J. Johnson, for the purpose of prostitution; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

2. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said John Arthur Johnson, otherwise known as Jack Johnson, late of the city of Chicago, on, to wit, the tenth day of August, in the year of our Lord nineteen hundred and ten unlawfully and knowingly did cause to be transported in interstate commerce, that is to say from Pittsburg, in the state of Pennsylvania, to Chicago, in the state of Illinois, through the said Eastern Division of the said Northern District of Illinois, over the railway route of a certain corporation common carrier, to wit, Pittsburgh, Ft. Wayne and Chicago Railway Company, a corporation under the laws of the state of Illinois, which corporation common carrier was then and there engaged in the transportation of persons by railroad over its railway route from Pittsburgh, in the state of Pennsylvania, to Chicago, in the state of Illinois, a certain girl, Belle Schreiber, otherwise known as Mrs. J. Johnson, for the purpose of debauchery; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

3. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said John Arthur Johnson,

otherwise known as Jack Johnson, late of the city of Chicago, on, to wit, the tenth day of August, in the year of our Lord nineteen hundred ten, within the division and district aforesaid, unlawfully, knowingly, and feloniously did cause to be transported in interstate commerce, that is to say, from Pittsburgh, in the state of Pennsylvania, to Chicago, in the state of Illinois, through the said Eastern Division of the said Northern District of Illinois, over the railway route of a certain corporation common carrier, to wit, the Pittsburgh, Ft. Wayne and Chicago Railway Company, a corporation under the laws of the state of Illinois, which corporation common carrier was then and then- engaged in the transportation of persons by railroad over its railway route from Pittsburgh, in the state of Pennsylvania, to Chicago, in the state of Illinois, a certain girl, to wit, Belle Schreiber, otherwise known as Mrs. J. Johnson, for the purpose of prostitution; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

8 4. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said John Arthur Johnson, otherwise known as Jack Johnson, late of the city of Chicago, on, to wit, the tenth day of August, in the year of our Lord nineteen hundred ten, within the division and district aforesaid, unlawfully, knowingly, and feloniously did cause to be transported in interstate commerce, that is to say, from Pittsburgh, in the state of Pennsylvania, to Chicago, in the state of Illinois, through the said Eastern Division of the said Northern District of Illinois, over the railway route of a certain corporation common carrier, to wit, the Pittsburgh, Ft. Wayne and Chicago Railway Company, a corporation under the laws of the state of Illinois, which corporation common carrier was then and there engaged in the transportation of persons by railroad over its railway route from Pittsburgh, in the state of Pennsylvania, to Chicago, in the state of Illinois, a certain girl, to wit, Belle Schreiber, otherwise known as Mrs. J. Johnson, for the purpose of debauchery; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

J. H. WILKERSON,
United States Attorney.

Endorsed: No. 5066. United States District Court, Northern District of Illinois, Eastern Division. The United States of America vs. John Arthur Johnson, otherwise known as Jack Johnson. Indictment for violation of White Slave Traffic Act. A true bill, O. J. Nelson, Foreman. Filed in open court this seventh day of November, A. D. 1912. T. C. MacMillan, Clerk. Bail $30000.00.

9 Your petitioner further shows that on November 7th, 1912, the Honorable Kenesaw M. Landis, one of the judges of said District Court, entered an order in said court fixing bail on said indictment in the sum of Thirty Thousand Dollars ($30,000.); that on the 8th day of November, 1912, said defendant tendered as

surety one Tiny Johnson, the mother of your petitioner, as surety, for the appearance of your petitioner; and the said Tiny Johnson schedules real estate situated in Cook County, Illinois, unincumbered, the fair market value of said real estate exceeding the sum of Thirty Thousand Dollars.

10 And in addition thereto your petitioner offered to deposit with the Clerk of the Court a certificate of deposit issued by the First National Bank of Chicago for the sum of Fifteen Thousand Dollars ($15,000.), and, if the court required, a certificate of deposit for the sum of Thirty Thousand Dollars ($30,000.), to be held by the Clerk of the said District Court, and to be declared forfeited in the event that your petitioner failed or neglected to comply with the terms of the recognizance for his appearance under the charge in the indictment above mentioned. Whereupon said Honorable Kenesaw M. Landis, Judge of the said District Court, stated in open court that he would not approve a cash bond for fifteen or thirty thousand dollars; that he would not accept a surety company upon the bond, or any owner of real estate, although such owner should schedule property sufficient as surety and if the owner of such real estate be indemnified.

Your petitioner further shows that the amount of bail fixed in this case is excessive; that the usual amount of the bail fixed in cases under the White Slave Traffic Act is Five Thousand Dollars ($5,000.); that the conditions made by the said Honorable Kenesaw M. Landis as to the kind of surety to be accepted by the court make it impossible for your petitioner to furnish the bail required in order to secure his liberty while awaiting trial on said indictment.

Your petitioner further shows that he is ready and willing to deposit with the clerk of the court, either a certificate of deposit, or lawful money of the United States, in such sum as the court

11 shall deem sufficient to secure the appearance of your petitioner.

Your petitioner further alleges that he is a colored man, and that for several weeks last past the newspapers of the City of Chicago have been printing divers untrue articles of and concerning your petitioner, until there is now a wide-spread prejudice against your petitioner, and this prejudice has grown to such an extent that unless your petitioner in some way indemnifies persons to sign bonds for the appearance of your petitioner, your petitioner will be unable to get owners of real estate to sign bonds for his appearance.

Your petitioner further shows that said imprisonment in the matter of the above indictment is illegal and in violation of the Constitution of the United States, for the following reasons:

1. The Act of Congress, approved June 25th, 1910, entitled, "An Act to Regulate Interstate and Foreign Commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes," is unconstitutional and void.

2. The Act of Congress, approved June 25th, 1910, entitled, "An Act to Regulate Interstate and Foreign Commerce by prohibiting the transportation therein for immoral purposes of women and girls,

and for other purposes," is not constitutionally within the
12 jurisdiction of the United States, and the matters therein referred to are judicially cognizable by the State tribunals only, and legislation thereon is among the constitutionally reserved rights of the several states, because the power to legislate concerning vice, health and morality is within the exclusive powers reserved to the States.

3. Said Act of Congress is in violation of the Tenth Amendment to the Constitution of the United States, which is as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

4. Said Act of Congress is in violation of the Fifth Amendment to the Constitution of the United States, which is as follows:

"No person shall be deprived of life, liberty or property without due process of law."

5. Said Act of Congress is unconstitutional and void because the power to enact the said law is not within the powers granted by the Constitution of the United States, and therefore Congress had no power and has no power, under the Constitution of the United States, to enact said law.

13 6. Said Act of Congress is invalid for the reason that the power granted by the Constitution of the United States to Congress "to regulate commerce" is a delegated power, and includes only the right to pass upon the morality of a passenger offered by a common carrier engaged in interstate commerce.

7. Said Act of Congress is invalid for the reason that the right of Congress "to regulate commerce" is confined to the regulation of traffic itself, and such matters as are necessarily incident to it, and cannot follow the moral status of a person traveling from state to state, because their moral acts fall exclusively within the police power of the respective states.

8. Said Act of Congress is unconstitutional because it is in violation of the provisions of the Constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

Wherefore your Petitioner prays that a Writ of Habeas Corpus may issue out of the District Court of the United States of America to the said Luman T. Hoy, United States Marshal, requiring him to produce the body of your petitioner before said court at some convenient time to be therein designated, there to abide what shall be awarded by the court in the premises; and that your petitioner may be discharged from said imprisonment. And in the event
14 that this Honorable Court cannot conveniently hear this petition immediately, your petitioner prays that he may be admitted to bail in such sum as this court shall deem sufficient, pending the hearing of said petition.

JOHN ARTHUR JOHNSON.

STATE OF ILLINOIS,
County of Cook, ss:

On this day, before me, came John A. Johnson, the above named Petitioner, and, being by me duly sworn, made oath that the foregoing petition, by him subscribed, is true, in substance and in fact.

Dated, Chicago, Ill., November 9, 1912.

THOMAS C. HANBERG,
[NOTARIAL SEAL.] *Notary Public.*

15 Endorsed: 31003. In the District Court of the United States of America, Northern District of Illinois, Eastern Division. United States of America ex rel. John A. Johnson vs. Luman T. Hoy. Petition for Writ of Habeas Corpus. Filed Nov. 9, 1912, at — o'clock — m. T. C. MacMillan, Clerk. Benjamin C. Bachrach, Attorney for Petitioner.

16 And afterwards to-wit on the ninth day of November A. D. 1912 an order was had and entered of record in said cause in words and figures as follows to-wit:

"UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

In the District Court Thereof, November Term, A. D. 1912.

Order Denying Petition for Habeas Corpus.

This cause coming on to be heard on motion of Benjamin C. Bachrach attorney for John A. Johnson for a writ of Habeas Corpus and the Court having read and considered the petition for Writ of Habeas Corpus.

It is ordered that the said Petition for Habeas Corpus be and the same is hereby denied.

17 And afterwards, to wit, on the 9th day of November, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Prayer for Appeal; same being in the words and figures following, to wit:

18 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the District Court Thereof, November Term, A. D. 1912.

No. —.

In the Matter of the Petition of JOHN A. JOHNSON for a Writ of Habeas Corpus.

Prayer for Appeal.

Now comes John A. Johnson, Petitioner, by Benjamin C. Bachrach, his attorney, and shows to the court that he has heretofore on

November 9, A. D. 1912, filed an assignment of errors in the above entitled cause in said District Court, and hereby prays that an appeal may be allowed in the above entitled cause to have reviewed in the Supreme Court of the United States of America the judgment of the court entered in said District Court.

BENJAMIN C. BACHRACH,
Attorney for John A. Johnson.

Endorsed: No. 31003. In the District Court of the United States for the Northern District of Illinois, Eastern Division. Prayer for Appeal. Filed Nov. 9, 1912 at 1 o'clock P. M. T. C. MacMillan, Clerk. Benjamin C. Bachrach, Attorney for John A. Johnson.

19 And afterwards, to wit, on the 9th day of November, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Assignment of Errors; same being in the words and figures following, to wit:

20 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the District Court Thereof, November Term, A. D. 1912.

UNITED STATES OF AMERICA ex Rel. JOHN A. JOHNSON
vs.
LUMAN T. HOY.

Assignment of Errors.

And now comes the pe-itioner, John A. *Jones*, by Benjamin C. Bachrach, his attorney, and in connection with his petition for an appeal herein say[illegible]at in the record and proceedings and in the order and judgm[illegible]in said cause, in denying said Writ of Habeas Corpus in said D[illegible]ict Court, error has intervened to the prejudice of John A. Joh[illegible]on, the petitioner; this petitioner hereby makes the following assignment of errors upon which he will rely upon the prosecution of an appeal in the above entitled cause, to wit:

1. The District Court erred in refusing to issue the Writ of Habeas Corpus.

2. The judgment of the District Court is contrary to the law applicable to thise case.

3. The court erred in not admitting the petitioner to bail in a reasonable amount.

4. The Act of Congress upon which the indictment in the case upon which petitioner is imprisoned is invalid because it is not within the powers granted by the Constitution of the United States.

21 5. Said Act of Congress being an Act of Congress known as the White Slave Traffic Act, approved June 25, 1910 and enforced July 1, 1910, is unconstitutional and void because not within the power of Congress to pass said act.

6. The petitioner by the action of Judge Kenesaw M. Landis, Judge of the District Court, in refusing to accept cash bond in the sum of $30,000. and any sureties to be indemnified for the signing of the pe-itioner's bond, thereby deprived the pe-itioner of the right to be enlarged on bail while said indictment against said petitioner is pending undetermined.

Wherefore the said pe-itioner by reason of the errors aforesaid prays that order denying the petition for Writ of Habeas Corpus be reversed and that the petitioner be admitted to bail pending the hearing of said case.

JOHN A. JOHNSON,
By BENJAMIN C. BACHRACH,
Attorney for John A. Johnson.

22 Endorsed: 31003. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America ex rel. John A. Johnson vs. Luman T. Hoy. Assignment of Errors. Filed Nov. 9, 1912 at 1 o'clock P. M. T. C. MacMillan, Clerk. Benjamin C. Bachrach, Attorney for John A. Johnson.

23 And afterwards, to wit, on the 9th day of November, A. D. 1912, the following order was had and entered of record in said cause, to wit:

24 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the District Court Thereof, November Term, A. D. 1912.

Order Granting Appeal.

On motion of Benjamin C. Bachrach, attorney for John A. Johnson, praying for an appeal of the above entitled cause, the court finds that an assignment of errors has been heretofore filed herein in said district court.

It is therefore ordered that an appeal be, and the same is hereby allowed to have reviewed in the Supreme Court of the United States of America the judgment and order entered herein by the said district court.

——— ———, *Judge.*

25 And afterwards, to wit, on the 9th day of November, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, at Citation; same being in the words and figures following, to wit:

26 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the District Court Thereof, November Term, A. D. 1912.

Citation.

United States of America and the President of the United States to James H. Wilkerson, United States Attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America, to be beholden at Washington, District of Columbia, within thirty days from the date hereof, pursuant to an appeal prayed in the District Court of the United States for the Northern District of Illinois, Eastern Division, in the matter of the Application of John A. Johnson for a writ of Habeas Corpus, to show cause, if any there be, why the judgment rendered against the petitioner, John A. Johnson, in the said matter should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Witness, George A. Carpenter, Judge of the said District Court of the United States, this 9th day of November, A. D. 1912.

GEO. A. CARPENTER,
District Judge.

Received a copy of the within and foregoing citation this 9th day of November, A. D. 1912.

J. H. WILKERSON,
U. S. Attorney.

Endorsed: 31003. Citation. Filed Nov. 9, 1912, at — o'clock — M. T. C. MacMillan, Clerk.

27 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record in Case No. 5066—wherein The United States of America is Plaintiff and John Arthur Johnson, otherwise known as Jack Johnson, is Defendant, prepared in accordance with præcipe filed herein, as same appears from the records and files in said cause now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office at Chicago, in said District, this 9th day of November, A. D. 1912.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN, *Clerk.*

Endorsed on cover: File No. 23,417. N. Illinois D. C. U. S. Term No. 842. John A. Johnson, appellant, vs. Luman T. Hoy, United States Marshal for the Northern District of Illinois. Filed November 11th, 1912. File No. 23,417.

Office Supreme Court, U. S.
FILED.
NOV 18 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1912.

No. 842

UNITED STATES OF AMERICA ex rel. JOHN A. JOHNSON,
Appellant,

vs.

LUMAN T. HOY,
Appellee.

MOTION TO ADVANCE.

BENJAMIN C. BACHRACH,
Attorney for John A. Johnson.

CHAMPLIN LAW PRINTING CO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

No. 842

UNITED STATES OF AMERICA ex rel. JOHN A. JOHNSON,
Appellant.

vs.

LUMAN T. HOY,
Appellee.

MOTION TO ADVANCE.

Now comes John A. Johnson, by Benjamin C. Bachrach, his attorney, and moves the court to advance the argument in the above entitled case, to be heard on January 6, 1913, in connection with the following cases:

Hoke et al. v. *United States*, No. 381;
Athamasaw v. *United States*, No. 588;
Harris v. *United States*, No. 602;
Bennett v. *United States*, No. 603;

upon the following grounds:

It is urged by appellant that the Act of Congress, passed June 25, 1910, approved July 1, 1910, known

as the "White Slave Traffic Act," is unconstitutional.

The four cases, numbered, respectively, 381, 588, 602 and 603, are to be heard on January 6, 1913, and are cases in which the indictments are based upon the statute above mentioned.

Benjamin L. Bachrach

Attorney for John A. Johnson.

No. 342.

JOHN ARTHUR JOHNSON, *Appellant*,

vs.

LUMAN T. HOY, U. S. MARSHALL, ETC., *Appellee*.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1912.

No. 842.

JOHN ARTHUR JOHNSON, APPELLANT,

vs.

LUMAN T. HOY, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, HONORABLE GEORGE A. CARPENTER, JUDGE PRESIDING.

BRIEF AND ARGUMENT FOR APPELLANT.

May it please the court:

This appeal seeks to review the order of the District Court for the Northern District of Illinois, Eastern Division, by which order a petition for writ of *habeas corpus* to release the appellant herein from custody of appellee was denied.

The Grounds of the Petition.

It is alleged in the petition that John Arthur Johnson, appellant herein, was imprisoned by Luman T. Hoy, United States marshal for the Northern District of Illinois, under an indictment charging him, John A. Johnson, of having caused the transportation, of aiding in the transportation, etc., of one Belle Schreiber in interstate commerce from one State to another for the purpose of prostitution and other immoral purposes.

It is further set forth in said petition that said indictment is based upon the act of Congress, approved June 25, 1910, known as the Mann White Slave Traffic Act.

It is further set forth in said petition that said act of Congress upon which said indictment is based is invalid because the act is not constitutionally within the powers granted to Congress by the several States. The petition also contains averments that the act is in violation of different sections of the Constitution.

It is further alleged in said petition that the Honorable Kenisaw M. Landis, district judge of the United States for the Northern District of Illinois, fixed excessive bail under said indictment in the sum of thirty thousand (30,000) dollars, and stated in open court that he would not accept cash bond in the sum of thirty thousand (30,000) dollars, nor a surety company, nor real estate surety where the surety has been indemnified.

The writ of *habeas corpus* prayed for in said petition was denied and no answer or return was filed thereto. Petition was sworn to and for the purpose of this case must be taken as true, except as to the conclusions of law.

I.

The Statute.

So much of the White Slave Traffic Act as is necessary for the consideration by this court is here set forth as follows:

> "*Transportation, etc., of Woman or Girl for Immoral Purposes, or Knowingly Procuring Ticket, etc., to be Used Therefor, a Felony; Punishment.*
>
> "SEC. 2. That any person who shall knowingly transport or cause to be transported, or aid, or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining any ticket or tickets, or any form of transportation or evidence of the right

thereof, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Terriory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court."

Act of June 25, 1910, c. 395; 2, 36 Stat., 825.

"*Inducing, etc., Transportation of Woman or Girl for Immoral Purposes, a Felony; Punishment.*

"SEC. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or caused to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such

person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years or by both such fine and imprisonment, in the discretion of the court."

Act of June 25, 1910, c. 395; 3, 36 Stat., 825.

II.

The Indictment.

The indictment consists of four counts. In the first count John A. Johnson is charged with causing to be transported in interstate commerce, from Pittsburgh, Pennsylvania, to Chicago, Illinois, over the Pittsburgh, Fort Wayne & Chicago Railway, a corporation, etc., a certain girl, Belle Schreiber, otherwise known as Mrs. John Johnson, for the purpose of prostitution.

The second count charges John A. Johnson with causing to be transported, in interstate commerce, from Pittsburgh, Pennsylvania, to Chicago, Illinois, over the Pittsburgh, Fort Wayne & Chicago

Railway, a corporation, etc., a certain girl, Belle Schreiber, otherwise known as Mrs. J. Johnson, for the purpose of debauchery.

The third count charges that John Arthur Johnson, within the district and division aforesaid, did cause to be transported, in interstate commerce, from Pittsburgh, Pennsylvania, to Chicago, Illinois, over the Pittsburgh, Fort Wayne & Chicago Railway, a corporation, etc., a certain girl, to wit, Belle Schreiber, otherwise known as Mrs. J. Johnson, for the purpose of prostitution.

The fourth count charges that John Arthur Johnson, within the district and division, did cause to be transported, in interstate commerce, from Pittsburgh, Pennsylvania, to Chicago, Illinois, over the Pittsburgh, Fort Wayne & Chicago Railway, a corporation, etc., a certain girl, to wit, Belle Schreiber, otherwise known as Mrs. J. Johnson, for the purpose of debauchery.

III.

POINTS RELIED UPON.

The order denying a petition for writ of habeas corpus in the above-entitled cause is erroneous, because the act of Congress upon which said indictment in said cause is based, to wit, sections 2 and 3 of the act of Congress approved June 25, 1910, entitled, "An Act to Further Regulate Interstate and Foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls, and for Other Purposes," is invalid for the following reasons:

A.

Said sections of the act of Congress above referred to are not constitutionally within the jurisdiction of the United States; the matters and things therein referred to are judicially cognizable by the State tribunals, and legislation thereon is among the constitutionally reserved rights of the several States because: The power to regulate vice and morality within a State is within the exclusive power of the particular State.

B.

Said sections of the act of Congress above referred to are in violation of the tenth amendment to the Constitution, which is as follows: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people."

C.

Said sections of the act of Congress above referred to are in violation of the fifth amendment to the Constitution, which is as follows: "No person shall be deprived of life, liberty or property without due process of law."

D.

Said sections of the act of Congress above referred to are invalid, because the power to enact said section of said act is not within the powers granted by the Constitution of the United States, and therefore Congress has no power under the Constitution to enact said law.

E.

Under the terms of the act in question, a person who transports, or causes the transportation of a woman from one State to another in interstate commerce, for the purpose solely of having intercourse with the woman in the foreign State to which the woman is carried, although the person is not engaged in trafficking among women, does not intend to supply a brothel in another State, nor to start any woman in the business of prostitution, nevertheless would be amenable to the punishment under the act in question as enforced in the case at bar, and because of the possibility of the act being used for the purpose indicated, the law is invalid.

F.

Neither the act in question nor any other act of Congress prohibits girls and women from traveling in interstate commerce from one State to another. Because Congress has not enacted a law in this respect regulating commerce among States, Congress is without power to enact a criminal law punishing a person transporting or causing, etc., of a girl or woman for the purpose of prostitution or other immoral purpose.

BRIEF OF ARGUMENT.

I.

The power to regulate vice and morality within the confines of the State is exclusively within the police power of the particular State, and Congress has no power to pass laws of this nature affecting persons within the confines of any State.

The police power of the State was never surrendered to the Federal Government. It is reserved to the State to be exercised by it in regulating and directing its internal affairs. Each State has exclusive control of all matters pertaining to its own internal police. It can establish and regulate ferries; control the moving of vessels in its harbors, and enact health and inspection laws. Its jurisdiction over all persons and things within its confines is just as broad within its limits as the jurisdiction of any foreign nation, except in so far as that jurisdiction or power is surrendered to the United States or is restrained by the Constitution of the United States.

King *vs.* Am. Transp. Co., 14 Fed. cases, 512.

It is fundamental that a State cannot divest itself of police power; this power is essential to its very existence, and it can neither surrender, abandon nor barter it away.

All the powers of our National Government are powers delegated to it by the States, and the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In territory not States of the United States, which territory is exclusively under the jurisdiction of the Federal Government, the police power over the internal affairs rests primarily in the Federal Government, but may be by the Federal Government administered through territorial agencies. The United States Government has entire jurisdiction over persons and things there residing and situated, and Congress may pass such laws for the regulation of its internal affairs as it may be necessary. This power is held by Congress by virtue of the second section of paragraph 3 of article 4 of the Constitution of the United States, which is as follows:

> "The Congress shall have power to dispose of and make all equal rules and regulations respecting the territory or other property belonging to the United States," etc.

It may there dignify misdemeanors into felonies. Within the confines of a State of the United States there is no warrant for the exercise of such authority by the Federal Government, and the Federal Government has no such authority within the territory and jurisdiction of a State and over citi-

zens of such State. Within the confines of the State the police power in its broadest and fullest extent exists and operates under State control. It can be invoked without Federal consent, and modified or relaxed without Federal interference. This power is inherent in the State. It finds its field of operation confined within the limits of its territorial jurisdiction. Whenever the Federal Government assumes to exercise police power within the confines of a State it invades the exclusive province and right of the State.

The State law reaches out and punished offenses of the nature embraced in the clause of the act of Congress of June 25, 1910. Under the police power of the State the State has ample authority to deal with the matter in such way as it may deem necessary and adequate, and the Federal Government has no power and no authority, corrective or visitorial, over the policy of the State in matters of police; certainly not to the extent of intruding by legislation upon matters within the exclusive jurisdiction of the State and affecting primarily the rights and liberties of its citizens and resting wholly within its police power as declared and administered under its laws.

The scope of Federal police power, like that of the State, is limited to territory over which it has exclusive jurisdiction; and as well might the State attempt to control with its laws citizens and persons of another State as for the United States Government to declare by its legislation what po-

lice regulation shall prevail in a State in a matter that is wholly within the police power of the particular State. Even where intoxicating liquors are carried from one State to another under the protection afforded by foreign and interstate commerce, nevertheless, under the police power, a State can prohibit the sale of such intoxicating liquors within its boundaries.

It can exclude immigrants of a class dangerous to its laws and institutions. It can quarantine against persons and articles of commerce. It can license and regulate prostitution, or prohibit it by law. Its policy in these matters may be criticised, but not controlled nor overthrown by any other sovereignty, State or national. It is supreme in the exercise of its police power, and its policy in that behalf can be attacked only from within, and not from without.

Even if the State failed to exercise its police power in prohibiting such offense, the Federal Government would be powerless to step in and enact laws in furtherance of its policy. The State can suppress, license, or totally ignore the so-called social evil, and its policy in doing any of the three can be overthrown only by public sentiment from within the State, but not by any legislation from without the State. Moreover, the social relation is one that is peculiarly and exclusively within the jurisdiction of the State. Institution of marriage is a matter over which, or about which, the Federal Government has no juris-

diction or concern. To regulate it is not among its delegated powers, nor is it incidental to the exercise of any delegated power.

As to the institution of marriage and the policy with relation thereto the States are supreme and may pass such laws as they see fit, so long as they are not inhibited by constitutional restrictions. The United States Government has no power to abridge, nullify, or supplement such State legislation, or to interfere with or supplant by legislation the express policy of the State in relation of social or marital conditions and relations.

II.

The Constitution of the United States is one of limited and expressly delegated powers, which can only be exercised as granted, or in the cases enumerated.

In the case of McCullough *vs.* The State of Maryland, 4 Wheat., 405, the court says:

> "This Government is acknowledged by all to be one of enumerated powers."

In the case of Houston *vs.* Moore, 5 Wheat., 48, the court says:

> "Nor ought any power to be sought, much less to be adjudged, in the favor of the United States, unless it be clearly within the reach of its constitutional character. Sitting here, we are not at liberty to add one jot of power to the National Government beyond what the people have granted by the Constitution."

In the Civil Rights case, 109 U. S., 3, the court says:

> "The fourteenth amendment does not invest Congress with power to legislate upon subjects that are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment."

In License case, 46 U. S. (5th How.), on page 576, Chief Justice Taney says:

> "It has, indeed, been suggested that if a State deems the traffic in ardent spirts to be injurious to its citizens, and calculated to introduce immorality, vice, and pauperism into the State, it may constitutionally refuse to permit its manipulation, notwithstanding the laws of Congress; and that a State may do this upon the same principle that it may resist and prevent the introduction of disease, pestilence, or pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are things to be regulated and trafficked in, but to be prevented as far as human foresight or human means can guard against them."

In the case of Gibbons *vs.* Ogden, 9 Wheat., 303, Chief Justice Marshall says:

> "No direct general power over these objects is granted to Congress, and, consequently, they remain subject to State legislation.
>
> "They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect trunpike roads, ferries, etc., are component parts of this mass.

It is respectfully insisted that the power enjoyed by the State to pass quarantine and health laws is nothing more or less than the police power of that State, and, under the police power of the State, the State has the power, and the exclusive power, to regulate vice and morality and to pass necessary laws for the protection of its citizens with reference thereto.

In License case, 5 Howard, 582, 583, the court says:

> "It has been said, indeed, that quarantine and health laws are passed by the States, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet ad-

mitted to be equally valid. But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States."

At page 589 the court says:

"A license to sell an article, foreign or domestic as a merchant, or innkeeper, or victualer is a matter of police and of revenue within the power of a state. It is strictly an internal regulation and cannot come in conflict, saving the rights of the importer to sell of any power possessed by Congress. It is said to reduce the amount of importation by lessening the profits of the thing imported. The license is a charge upon the business, or profession, and not a duty upon the things sold. The same price is charged to every retailer of merchandise or spirits, at the same place, without regard to the amount sold. This charge is in advance, of any sale, it would be difficult to show that such a regulation reduced the

amount of imported goods. But if this were the effect of the license, would that make the acts unconstitutional?

"The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown in the sea. This comes in direct conflict with the regulation of commerce; and yet no one doubts the local power."

At page 608 the court says:

"That the police power of the States was reserved to the States, and that it is beyond the reach of Congress; but that such police power extends to articles only which do not belong to foreign commerce, or to commerce among the States, at the time the police power is exercised in regard to them."

On page 629 the court says:

"Nor is there, in my view, any power conferred on the General Government which has a right to control this matter of internal commerce or police, while it is fairly exercised so as to accomplish a legitimate object, and by means adopted legally and suitably to such end alone.

"It is the undoubted and reserved power of every State here, as a political body, to decide independent or any provisions made by Congress, though subject not to conflict

with any of them when rightful, who shall compose its population, who become its residents, who its citizens, who employ the privilege of its laws, and be entitled to their protection and favor, and what kind of property and business it will protect."

n page 630 the court says:

"There may be some doubt whether the General Government or each State possesses the prohibitory power, as to persons or property of certain kinds from coming into the limits of the State. But it must exist somewhere; and it seems to me rather a police power, belonging to the States, and to be exercised in the manner best suited to the tastes and institutions of each than anywhere granted or proper to the peculiar duties of the General Government."

On page 631 the court says:

"Where can such a power also be safer lodged than with those public bodies, or States, who are themselves to be the greatest sufferers in interest and character by an improper use of it?

"The States stand properly on their reserved rights, within their own powers and sovereignty, to judge of the expediency and wisdom of their own laws; and while they take care not to violate clearly any portion of the Constitution or statutes of the General Government, our duty to that Constitution and laws, and our respect for State rights, must require us not to interfere."

On page 632 the court says:

"As subjects of legislation, they are from their very nature, of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision, *salus populi suprema lex.*

"If the right to control these subjects be incomplete, unqualified, and exclusive in the State legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground or prerogative or supremacy. The existence of the social compact requires that such laws be executed before and above all others.

"It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers; they operate on the ship, the agents, or navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, though in the service of the Government, are arrested, imprisoned, and punished for their offenses against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power which the State assumes to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservation of health, prevention of crime, and protection of the public welfare must of necessity have full and full operation, according to the exigency which requires their interference."

In the case of King *et al. vs.* American Transp. Co., 14 Fed. Cases, 513, the court sar:

> "But this constitutional grant of power does not confer upon Congress the authority to extend its legislation throughout the entire sphere of legislation of the several States.
>
> "Each State has exclusive control of all matters pertaining to its own internal police. It can establish and regulate ferries across its rivers, control the moving of vessels within harbors within its borders, and enact health and inspection laws, which, by quarantine or otherwise, may operate on persons brought within its jurisdiction in the course of commercial operations. The Supreme Court of the United States in the case of City of New York *vs.* Milne, 11 Pet., 36, U. S., 139, broadly declared the doctrine, that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States."

Counsel for plaintiffs in error have failed to find any case wherein the Supreme Court of the United States has held, in interpreting the constitutional power of Congress, that Congress has the power to enact laws operative upon persons and things or land *within* the boundaries of State jurisdiction.

The fourteenth amendment of the United States Constitution forbids the State from abridging the privileges belonging to a person as a citizen of the

United States, but does not forbid the States from abridging the privileges belonging to their citizens as citizens of States.

Marriage is a privilege belonging to persons as members of society and as citizens of the States in which they reside, and may be abridged at the will of the State in which they reside.

Marriage, though a contract, is more than a civil contract, and is not affected by the clause of the tenth section of the first article of the Constitution forbidding a State from passing any laws impairing the obligation of contracts.

In Passenger case, 48 U. S., 287, at page 405, the court says:

> "When the merchandise is taken from the ship and becomes mingled with the property of the people of the State, like other property, it is subject to the local law; but until this shall have taken place the merchandise is an import and is not subject to the taxing power of the State, and the State rule applies to passengers when they leave the ship and mingle with the citizens of the State, they become subject to its laws."

The purely restrictive or negative influence of the Federal Constitution upon the police power of the State is more important than the positive police legislation of Congress. A deliberate purpose to place the State police power under federal control can hardly be attributed to the framers of the Constitution. The prohibitions upon State legislation contained in the original Constitution and

directed against invasion of vested rights by restrictive statutes; the first ten amendments apply only to the Federal Government itself, the thirteenth amendment interfered with the police power of the State, but only as to the specific institution of slavery. The fourteenth amendment and the commerce clause are at present chiefly relied upon as checks upon the police power of the State. It may, therefore, be stated as a general proposition, that the police power in the United States is located in the States. The State is entrusted with the duty of enacting and maintaining all those internal regulations which are necessary for the preservation and the prevention of injury to the rights of others. The United States Government cannot exercise its power, except in those cases in which the power of regulation is granted to the General Government, expressly or by necessary implication; for example, it was held unconstitutional for Congress to declare to be a misdemeanor for anyone to mix naphtha and illuminating oil and offer the adulterated oil for sale, or to prohibit the sale of petroleum that is inflammable at less than the given temperature. This was a police regulation that could only be established by the State.

2 Tiedeman on State and Federal Control of Persons and Property, 1019.
United States *vs.* Dewitt, 9 Wall., 41.
Patterson *vs.* Kentucky, 97 U. S., 501.

Police powers of a State are the powers of Government inherent in any sovereignty to the extent of its dominions and are exercisable by the States of the Union to regulate commerce, except as such exercise is restricted by Federal Constitution.

Per Tanney, page 583; per McLean, page 582, in License case, 4 U. S.

The legislative power of a State extends to everything within the sphere of such power, except as it is restricted by the Federal Constitution or that of the State.

Township of Pine Grove *vs.* Talcott, 86 U. S., 670.

In the City of New York *vs.* Miln, 36 U. S., 105; 11 Peters, 102, the court says at page 138:

> "A State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation where that jurisdiction is not surrendered or limited by the Constitution of the United States. * * * That all powers which relate to merely municipal legislation or what may perhaps more properly be called *internal police,* are not thus surrendered or restrained, and that consequently in relation to these the authority of the State is complete, unqualified, and *exclusive.* * * * We should say that every law came within this description which concerns the welfare of the whole people of a State, or any individual within it, or whether it related to their rights or their duties, whether it respected them, as men or

as citizens of the State, whether in their public or private relations, whether it related to the rights of persons or of property, or the whole people of a State, or of an individual within it, and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction. * * *

"The right to punish or prevent crime in no degree depends upon the citizenship of the party who is obnoxious to the law. The alien who shall just have set his feet upon the soil of the State, is just as subject to the operation of the law as one who is a native citizen. * * * Now, why is this? For no other reason than this: Simply that being within the territory and jurisdiction of New York they are liable to the laws of that State, and among others, to its criminal laws, and this, too, not only for treason, murder and other crimes of that degree of atrocity, but for the most petty offenses which can be imagined. * * *

"*Persons* are not the subject of commeree and not being imported goods, they do not fall within the reasoning founded upon the construction of a power given to Congress to regulate commerce, and the prohibition of the State from imposing a duty on imported goods."

At page 132, the court says:

"Let us see what powers are left with the States. The Federalist, in the 45th number, speaking of this subject, says: 'The powers reserved to the several States will extend to all objects which in the ordinary course of affairs concern the lives, liberties and prop-

erties of the people, and the internal order, improvement and prosperity of the State.'

"And this court, in the case of Gibbons *vs.* Ogden, 9 Wheat., 203, in speaking of the inspection of the laws, say:

"They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the General Government, all which can be most advantageously exercised by the States themselves."

At page 137 the court says:

"Another section requires the master to report to the collector a list of all passengers, designating the age, sex, occupation, the country to which they belong, etc., which list is required to be delivered to the Secretary of the State and which he is directed to lay before Congress. The object of this clause, in all probability, was to enable the Government of the United States to form an accurate estimate of population by immigration; *but whatever may have been its purpose, it is obvious that those laws only affect, through the power over navigation, the whilst on their voyage, and until they shall have landed; after that and when they have ceased to have any connection with the ship,* and when, therefore, they have *ceased* to be passengers, we are satisfied that acts of Congress applying to them, such, and only professing to legislate in relation to them as such, have them performed their office and can with no propriety of language, be said to come in conflict with the laws of the State, whose operation only begins when

that of the laws of Congress ends; whose operation is not even on the same subject, because, although the person on whom it operates is the same, yet having ceased to be a passenger, he longer stands in the only relation in which the laws of Congress either professed or intended to act upon him."

In United States *vs.* Dewitt, 76 U. S., 41, Dewitt was indicted under a law passed by Congress which made it a misdemeanor, punishable by a fine and imprisonment, to mix for sale naphtha and illuminating oils, or to sell or offer for sale such mixtures, or to sell or to offer for sale oil made of petroleum for illuminating purpose inflammable at a less temperature or fire-test than 100 degrees. In the opinion the court says:

> "As a police regulation, relating exclusively to the internal trade of the State, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits it can have no constitutional operation. This has been so frequently declared by the court, results so obviously from the terms of the Constitution, has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." (License case, 5 How., 504; Passenger cases, 7 How., 283; License Tax cases, 5 Wall., 470, and cases cited.)

In Slaughtering House case, 83 U. S. (6 Wall.), at page 64, the court says of the U. S. *vs.* Dewitt:

> "In that case an act of Congress which undertook as a part of the internal revenue law to make it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell oil or petroleum inflammable at less than a prescribed temperature, was held to be void, because as a police regulation the power to make such a law belonged to the State and did not belong to Congress."

In the American constitutional system the power to establish the ordinary regulations of police has been left with the individual States, and cannot be assumed by the National Government.

Cooley, Const. Lim., 574.

It (police power) is embraced in what Mr. Chief Justice Marshall, in Gibbons *vs.* Ogden, calls the "immense mass of legislation," which can be most advantageously exercised by the State and over which the National Government cannot assume supervision or control.

Patterson *vs.* Kentucky, 97 U. S., 503.

In U. S. *vs.* Knight, 156 U. S., at page 11, Chief Justice Fuller, rendering the opinion of the court, says:

> "It cannot be denied that the power of the State to protect the lives, health, and property of its citizens, one to preserve good order and the public morals, 'the power to

govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the General Government, nor directly restrained by the Constitution of the United States, and, essentially *exclusive.*"

In re Rohrer, 140 U. S., 555, the court says:

"In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the National Government, and that in this respect it is not interfered with by the Fourteenth Amendment."

Barber *vs.* Connolly, 133 U. S., 27, 31.

"The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the General Government nor directly restrained by the Constitution of the United States, and essentially *exclusive.*"

And this court has uniformly recognized State legislation, for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the National Government.

III.

Granted that under the Commerce clause of the Constitution Congress has plenary power to legislate concerning all matters affecting interstate commerce, even if Congress enacts a law forbidding women to travel from one State to another for purpose of prostitution, or other immoral purposes (which Congress failed to do in this instance), what is the extent of the power of Congress in enacting laws in order to make this legislation effective?

A question almost identical with this was discussed by this court in the case of Howard *vs.* Illinois C. R. R. Co., 28 Sup. Ct. Rep., p. 147. This is the case wherein the provision of the Employers' Liability Act of July 11, 1906, was assailed, for the reason that it was unconstitutional. Among other things, on page 147, this court says:

> "It remains only to consider the contention which we have previously quoted, that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which

it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however, inherently local; would obliterate all limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which, from the beginning have been, and must continue to be, under their control so long as the Constitution endures."

In the Trade Mark cases, 100 U. S., 96, this court says:

"Governed by this view of our duty, we proceed to remark that a glance at the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or

traffic between citizens of the same State, is beyond the control of Congress.

"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of power not confided in Congress."

In the case of Williams *vs.* Fears, 21 Sup. Ct. Rep., 131, there is quoted with approval, in the opinion, an extract of a former opinion of this court by Mr. Justice White. Said quotation is taken from the case of Hooper *vs.* California, 15 Sup. Ct. Rep., 210, wherein the court says:

"It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce, or an instrumentality thereof, on the one side, and the mere incident which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which such commerce might give rise and

to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States, and would exclude State control over many contracts purely domestic in their nature."

IV.

While Congress, under the constitutional power to regulate commerce, can regulate the transportation of commodities and persons, where, as in the act under consideration, girls and women are not forbidden to travel from one State to the other, Congress is without power to punish the persons who cause their transportation for an immoral purpose.

While Congress has the power, under its general authority, to make all laws necessary and proper to execute its delegated and constitutional powers, it has no power to punish the person or persons who cause the transportation of a woman in interstate commerce for an immoral purpose, where it does not forbid the woman to travel in interstate commerce for immoral purposes.

Assuming, for the sake of argument, that Congress had the power to forbid women to travel in interstate commerce from one State to another for purposes of prostitution or other immoral purposes, and assuming further, that Congress enacted a law forbidding women to travel in interstate commerce from one State to another for purposes of prostitution or other immoral purposes,

even then it may well be doubted whether Congress, under its general authority to make all laws necessary and proper to execute its delegated and constitutional powers, could legally enact a law punishing a person within a State who furnished transportation for such person or induced such a woman or aided such a woman in going from one State to the other for an immoral purpose.

In the case of Keller *vs.* The United States, 29 Supreme Ct. Reporter, p. 470, decided April 5, 1909, this court was called upon to pass upon a section of the immigration law of February 20, 1907. So much of that law as was then passed upon is as follows:

> "or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dol'lars."

In that case the claim of the Government was that inasmuch as Congress had plenary power to regulate the influx and egress of aliens in times of peace and war, Congress, under its general authority to enforce such laws as it had enacted, had the power to punish a person harboring an alien

woman for purposes of prostitution within three years after such alien landed.

The claim of the Government is best expressed in the dissenting opinion by Mr. Justice Holmes in that case, wherein Mr. Justice Holmes says:

> "If Congress can forbid the entry and order the subsequent deportation of professional prostitutes, it can punish those who co-operate in the fraudulent entry. 'If Congress has power to exclude such laborers * * * it has the power to punish any who assist in their introduction.' That was a point decided in *Lees vs. United States,* 150 U. S., 476, 480. The same power must exist as to cooperation in an equally unlawful stay. The indictment sets forth the facts that constitute such cooperation and need not allege the conclusion of law. On the principle of the cases last cited, in order to make its prohibition effective, the law can throw the burden of finding out the fact and date of a prostitute's arrival from another country upon those who harbor her for a purpose that presumably they know in any event to be contrary to law. Therefore, while I have admitted that the time fixed seems to be long, I can see no other constitutional objection to the act, and, as I have said, I think that that one ought not to prevail."

Notwithstanding this claim of the Government, the court, in the case of Keller *vs.* United States, *supra,* say (opinion by Mr. Justice Brewer):

> "The single question is one of constitutionality. Has Congress power to punish

the offense charged, or is jurisdiction thereover solely with the State? Undoubtedly, as held, 'Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers.' Turner *vs.* Williams, 194 U. S., 279, 289. See also Fong Yue Ting *vs.* United States, 149 U. S., 698, 708; Head Money cases, 112 U. S., 580, 591; Lees*vs.* United States, 150 U. S., 476, 480; United States *vs.* Bitty, 208 U. S., 393.

"It is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien, for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires, or the testimony shows, she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow her degraded life. While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the State, for there is in the Constitution no grant thereof to Congress.

"In Patterson *vs.* Kentucky, 97 U. S., 501, 503, is this declaration:

"'In the American constitutional system,' says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual States, and cannot be assumed by the national government.' Cooley Const. Lim., 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the States must observe in its exercise, the existence of such a power in the States has been uniformly recognized in this court. Gibbons vs. Ogden, 9 Wheat., 1; License cases, 5 How., 504; Gilman *vs.* Philadelphia, 3 Wall., 713; Henderson *et al. vs.* Mayor of the City of New York *et al.*, 92 U. S., 259; Railroad Company *vs.* Husen, 95 *Id.*, 465; Beer Company, *vs.* Massachusetts, *supra*, p. 25. It is embraced in what Mr. Chief Justice Marshall in Gibbons *vs.* Ogden, calls that 'immense mass of legislation,' which can be most advantageously exercised by the States, and over which the national authorities cannot assume supervision or control.'

"And in Barbier *vs.* Connolly, 113 U. S., 27, 31, it is said:

"'But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and to add to its wealth and prosperity.'

"Further, as the rule of construction, Chief Justice Marshall, speaking for the court in the great case of M'Cullough *vs.* State of Maryland, 4 Wheat., 316, 405, declares:

" 'This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist.'

"In Houston *vs.* Moore, 5 Wheat., 1, 48, Mr. Justice Story says:

" 'Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the National Government beyond what the people have granted by the Constitution.'

"Art. 10 of Amendments; City of New York *vs.* Miln, 11 Pet.., 102, 133; License cases, 5 How., 504, 608, 630; United States *vs.* Dewitt, 9 Wall., 41, 44; Patterson *vs.* Kentucky, 97 U. S., 501, 503; Barbier *vs.* Connolly, 113 U. S., 27, 31; *In re* Rahrer, 140 U. S., 545, 555; United States *vs.* Knight, 156 U. S., 1, 11; Cooley's Constitutional Limitations, 574.

"Doubtless it not infrequently happens

that the same act may be referable to the power of the State as well as to that of Congress. If there be collision in such a case the superior authority of Congress prevails. As said in city of New York *vs.* Miln, 11 Pet., 102, 137:

"'From this it appears that whilst a State is acting within the legitimate scope of its power as to the end to be attained it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by Congress acting under a different power, subject only, say the court, to this limitation, that in the event of collision the law of the State must yield to the law of Congress. The court must be understood, of course, as meaning that the law of Congress is passed upon a subject within the sphere of its power.'

"In Gulf, Colorado & Santa Fe Railway *vs.* Hefley, 158 U. S., 98, 104, the rule is stated in these words:

"'Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' Henderson *vs.* New York, 92 U. S.,

259, 271. 'Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise for any purpose whatever, encroach upon the powers of the General Government, or rights granted or secured by the supreme law of the land.' New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650, 661. 'While it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail.' Morgan *vs.* Louisiana, 118 U. S., 455, 464.

"See also Lottery case, 188 U. S., 321.

"The question is, therefore, whether there is any authority conferred upon Congress by which this particular portion of the statute can be sustained. By section 2 of article II of the Constitution, power is given by the President, by and with the advice and consent of the Senate, to make treaties, but there is no suggestion in the record or in the briefs of a treaty with the King of Hungary under which this legislation can be supported.

"The general power which exists in the nation to control the coming in or removal of aliens is relied upon, the Government stating in its brief these two propositions:

" 'The clause in question should be held valid because it relates to and materially affects the conditions upon which an alien female may be permitted to remain in this

country, and the grounds which warrant her exclusion.

* * * * * * *

"'The validity of the provision in question should be determined from its general effect upon the importation and exclusion of aliens.'

"But it is sufficient to say that the act charged has no significance in either direction.

"As to the suggestion that Congress has power to punish one assisting in the importation of a prostitute it is enough to say that the statute does not include such a charge; the indictment does not make it, and the testimony shows, without any contradiction, that the woman, Irene Bodi, came to this country in November, 1905; that she remained in New York until October, 1907; then came to Chicago and went into the house of prostitution which the defendants purchased in November, 1907, finding the woman then in the house; that she had been in the business of a prostitute only about ten or eleven months prior to the trial of the case in October, 1908, and that the defendants did not know her until November, 1907. In view of those facts the question of the power of Congress to punish those who assist in the importation of a prostitute is entirely immaterial.

"The act charged is only one included in the great mass of personal dealings with aliens. It is her own character and conduct which determines the question of exclusion or removal. The acts of others may be evidence of her business and character. But it does not follow that Congress has the

power to punish those whose acts furnish evidence from which the Government may determine the question of her expulsion. Every possible dealing of every citizen with the alien may have more or less induced her coming. But can it be within the power of Congress to control all the dealings of our citizens with resident aliens? If that be possible, the door is open to the assumption by the National Government of an almost unlimited body of legislation. By the census of 1900 the population of the United States between the oceans was in round numbers 76,000,000. Of these, 10,000,000 were of foreign birth, and 16,000,000 more were of foreign parentage. Doubtless some have become citizens by naturalization, but certainly scattered through the country there are millions of aliens. If the contention of the Government be sound, whatever may have been done in the past, however little this field of legislation may have been entered upon, the power of Congress is broad enough to take cognizance of all dealings of citizens with aliens. That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. And the legislation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away

from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. Fairbank *vs.* United States, 181 U. S., 283. To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forgot the declaration in Texas *vs.* White, 7 Wall., 700, 725, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

"The judgments are reversed and the cases remanded to the District Court of the United States for the Northern District of Illinois, with instructions to quash the indictment."

V.

Under the terms of the act in question, a person who transports, or causes the transportation of a woman from one State to another in interstate commerce, for the purpose solely of having intercourse with the woman in the foreign State to which the woman is carried, although the person is not engaged in trafficking among women, does not intend to supply a brothel in another State, nor to start any woman in the business of prostitution, nevertheless would be amenable to the punishment under the act in question as enforced in the case at bar, and because of the possibility of the act being used for the purpose indicated, the law is invalid.

In case of Yick Wo *vs.* Hopkins, 118 U. S., 356, and cited with approval in the case of Dobbins *vs.* City of Los Angeles, 25 Sup. Ct. Rept., 22, the Supreme Court of the United States held:

> "That although an ordinance might be lawful upon its face and apparently fair in its terms, yet if it was enforced in such manner as to work a discrimination against a part of the community, or lawfully cause such exercise of power, would be invalidated by the courts."

The indictment in the case at bar does not charge any trafficking in women. The woman spoken of in the indictment does not come under this head of articles of commerce, however much professional prostitutes sold by man to another man or woman might be. There is no contention on the part of the Government that John A. John-

son trafficked in women. The indictment shows the length to which the act in question is stretched by the prosecuting officers of the Government. The offense really aimed at by the indictment has nothing to do with the commerce that Congress under the commerce clause of the Constitution has the power to regulate.

The acts that Johnson are charged with doing could in no way affect commerce. The acts charged are acts supposed to have been committed in some city in another State than the one in which the trip commenced. The use to which the act in question has been put, it might well be said, Congress never intended, but because of that possibility which has occurred in this case as a certainty, the act becomes invalid, because the power to punish persons for fornication, merely because to commit a fornication the man and the woman travel in interstate commerce from one State to another, must be left for punishment to the State laws and for Congress to legislate in such a way as to make the act an offense is clearly a usurpation of State power.

Considered from the standpoint of its title and the name under which Congress declared it should be known the white slave traffic act deals with the question that was much in the public mind previous to and about the time of its enactment in June, 1910. Considerable public interest had been aroused by certain newspaper and magazine articles, in which it was asserted without qualification and a great deal of positiveness that the buying

and selling of women and girls for the purpose of prostitution had reached such enormous proportions that an international organization existed, with headquarters in New York, London, Berlin, St. Petersburg, and other great cities in this and other countries, which controlled the market for these unfortunates, keeping up the supply, fixing the prices and furnishing transportation from city to city, State to State, or country to country, as occasion or demand required. It was further asserted by these writers that certain political organizations in New York and elsewhere were financially interested in the business and that the influence of these organizations was therefore fully exerted at all times for its protection. Great indignation followed these so-called disclosures and steps were taken to investigate the matter. A joint committee of Congress made a thorough investigation and, following its report, the law in question was enacted. Its object was the prevention of the traffic in so-called white slaves, to wit, the buying and selling of girls and women for immoral purposes, and for that reason Congress gave to it the name "White Slave Traffic Act." The word "traffic" has always had a well understood meaning in the proper sense. It is the passing of goods or commodities from one person to another for the equivalent in goods or money, and a trafficker is one who traffics, a trader, a merchant (Senior *vs.* Ratterman, 44 Ohio State, 661). The word "traffic" is defined by Bouvier as "commerce,

trade, sale or exchange of merchandise, bills, money, and the like." Webster defines it as "commerce either by barter or by buying and selling; trade." This word, like trade, comprehends every species of dealing in the exchange or passing of goods and merchandise from hand to hand for an equivalent.

Curtis vs. Atkinson, 36 Nebr., 110.
In re *Camerontown Mutual Fire, L. & W. Ins. Co.*, 96 Fed., 756, 757.

If we examined the language of the act itself, more particularly section 4, it will be observed that the intent of the name and title has been carried out in the text as well. It is provided therein that the woman or girl shall be enticed from one State to another with the purpose or intent to induce or coerce her to "engage in prostitution or debauchery or other immoral practices."

"Engage" is defined in the Standard Dictionary as "to busy oneself, to be occupied or devoted, take part, as to engage in trade," and does not relate to an occasional act outside of the regular employment.

The case of U. S. *vs.* Warner, 188 Fed. Rep., which was before the Circuit Court in the Second Circuit, holds the act in question to be constitutional, but it appears from the opinion of Judge Holt, overruling the demurrer in that case, that Judge Holt personally believed it unconstitutional if the act designed to cover such a case as the case at bar. The opinion of Judge Holt is as follows:

"This is a demurrer to an indictment. The indictment is brought under the act of June 25, 1910, making it a criminal offense for a person to transport or assist or pay for the transportation from one State to another of any woman for an immoral purpose. The ground of the demurrer is that the act is unconstitutional. If this were an original question my opinion would be that the act is unconstitutional. I do not believe that the framers of the Constitution ever imagined that the power conferred upon Congress by the Constitution to regulate commerce between the States would authorize the enactment by Congress of such a statute. Under this statute, if a man takes a woman for an immoral purpose from New York across the North river to Jersey City, he is guilty of a crime punishable by imprisonment for five years and a fine of $5,000. If the same man takes the same woman for the same purpose from New York across the East river to Brooklyn he is guilty of no crime at all. This statute, in my opinion, in effect attempts to exercise a purely police power of the State under the guise of regulated commerce. *If this statute is constitutional it is in the power of the Federal Government to make it a criminal act for any person to go from one State to another while engaged in any crime, fraud, or object which may be deemed objectionable by Congress.* But in view of the decision of the Supreme Court in the Lottery case, 186 U. S., 321, holding that Congress had authority to prohibit the transaction of lottery tickets between the States; of Passenger cases, 7 How., 283, holding that the

transportation of passengers is a part of commerce; of Judge Wolverton, in U. S. *vs.* Westman, 182 Fed., 1017, holding the statute constitutional, and the general tendency of legislation and of judicial decisions in recent years upon the cognate subjects, I think it sufficiently doubtful whether the act in question will be held unconstitutional by the United States Supreme Court to make it improper for a court of first instance to hold it to be so."

The debate in the House of Representatives which culminated in the passage of this act occurred on January 19, 1910, and is reported in the Congressional Report, volume 45, part 1. Reference is asked to the views of the minority stated on page 822. An examination of the debate will show that the measure was supported on constitutional grounds by Congressman Russell, of Texas, only. Judge Russell was unable to adduce any principle of constitutional law drawn from legislative or judicial precedent, for the position which he took is on purely moral grounds. The minority, on the other hand, appealed both to theory and precedent in support of their contention that Congress had not constitutional authority to enact this measure.

Both the minority and the majority apparently recognized that there was a difference between the White Slave Law as applied to the States and the same law as applied to the exclusion of undesirable aliens.

In the case of U. S. *vs.* Hoke, 187 Fed., 992, same Congressman Russell, having been elevated to the bench, renders the decision and argues for the constitutionality of the act in question, but it is apparent all through the decision that the learned judge had in mind the white traffic as generally understood, and nowhere does he refer to the constitutionality of the act as covering a case like the one at bar. On page 1003 the court expressed itself in these words:

> "As a State may, for the purpose of guarding the morals of its own people, forbid all immorality within its limits, so Congress, for the purpose of guarding the people of the United States against the wide-spread pestilence of prostitution and to protect the commerce, which concerns the people of all the States, may prohibit the carrying of women and girls from one State to another for the purpose of placing them in houses of ill fame."

VI.

Passengers on interstate carriers engaged in interstate travel are not engaged in commerce.

It is evident that the act can only be sustained as a regulation of commerce under article I, section 8, sub. 3, of the Federal Constitution, which reads:

> "The Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

If the word "commerce" can be construed as including the ingress and egress of passengers from States by a common carrier, then an act prohibiting women from traveling from State to State in interstate commerce for an immoral purpose would be upheld; and if the word "commerce" cannot be construed in the act as including ingress and egress of passengers from States, the act must fall, for the Government is only one of enumerated powers and unless this act falls within one of the powers given it in this state of the commerce laws it is unconstitutional.

Gibbons vs. Ogden, 12 Wheat., 1.
Lottery Cases, 188 U. S., 321.

The word "commerce" has been defined many times by the court, and perhaps the best definition, the one which is followed the most, is that which was given in Gibbons *vs.* Ogden, *supra,* where Chief Justice Marshall, at page 168, says:

> "The subject to be regulated is commerce and our Constitution being, as was aptly said at the bar, one of enumerated powers and not of definition to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying or selling, or the interchange of commodities and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic, but it is something more, it is intercourse between nations, and parts

> of nations, in all its branches and is regulated by prescribing rules for carrying on that intercourse."

And in the case of Hooper *vs.* California, 155 U. S., 648, 655, the court says:

> "The making of such a contract is a mere incident of commercial intercourse."

This language is reiterated *in hæc verba* in N. Y. Life Ins. Co. *vs.* Cravens, 178 U. S., 389, 401.

The meaning of this word is again discussed in the dissenting opinion in the Lottery case, and this is still law, for the opinion of the four dissenting members of the Supreme Court as to this was not repugnant to the prevailing opinion by the court. Chief Justice Fuller, writing the dissenting opinion, says, at page 367:

> "When Chief Justice Marshall said that commerce embraced intercourse, he added 'commercial intercourse' and this was necessarily so since, as Chief Justice Taney pointed out, if intercourse were a word of larger meaning than the word commerce, it could not be substituted for the word of more limited meaning contained in the Constitution."

And in the case of Pensacola Telegraph Co. *vs.* Western Union Telegraph Co., 96 U. S., at page 9, Chief Justice White says:

> "Since the case of Gibbons *vs.* Ogden, 9 Wheat., 1, it has never been doubted that commercial intercourse is an element within the regulating power of Congress."

Thus there must be more than the intercourse between State to State of citizens to constitute commerce. The intercourse must be commercial, and cannot it be said that the intercourse of passengers is always commercial? It may be for sure with no attributes of commerce connected therewith. There must be something connected with this intercourse which smacks of barter and sale or exchange of commodities before it can be said that the intercourse or the egress or ingress of passengers between the States can be truly commerce.

The Lottery case, *supra,* is an authority for this position, for if the mere transportation of lottery tickets in that case was enough, no long demonstration such as was indulged in would have been necessary to show that lottery tickets were a subject of commerce; the mere transportation of them would have been sufficient to support the act there in question. Thus it is apparent that the cases cited hold that something more than mere intercourse is necessary; this intercourse must be commercial. And the mere fact that a passenger is traveling from State to State does not make his intercourse commercial. Counsel for appellant has examined the Passenger cases, 7 How., 283; Gloucester Ferry Co. *vs.* Penn., 114 U. S., 196; Covington Bridge Co. *vs.* Kentucky, 154 U. S., 204; County of Mobile *vs.* Kimball, 102 U. S., 691; Wabash R. R. Co. *vs.* Illinois, 118 U. S., 557; Gibbons *vs.* Ogden, *supra,* and Pickard *vs.* Pullman Car Co., 107 U. S., 34, and have had them referred

to us as authorities for the proposition that passengers from State to State are engaged in interstate commerce, but they are not authorities in this case.

They were all cases in which, as distinguished from our case, the regulation of commerce or the State was aimed at the carrier. There it might well be that passengers engaged in interstate travel were subjects of commerce, for as to the carrier the carrying of passengers was his commerce, his livelihood. But these cases did not even go as far as holding that such passengers were subjects of commerce. They only held that, as regards the carrier, "the transportation of passengers in interstate travel is interstate commerce." This, it is submitted, is very different from holding that, as to a statute aimed at the passenger, he is, when going from a State to a State, engaged in interstate commerce.

In the Passenger cases the statutes held unconstitutional were acts of New York and Massachusetts imposing a tax on the master of every ship arriving at their port from a foreign country or another State at a certain rate, proportioned to the number of passengers carried. The court here, at page 401, says:

> "No clear distinction is perceived between the power to regulate vessels engaged in transporting men for hire and property."

In the Gloucester case the State of Pennsylvania attempted to tax a ferry running between

New Jersey and Pennsylvania. This was rightly held to be unconstitutional. The court, Mr. Justice White writing the opinion, says, at page 203:

> "Commerce among the States consists of intercourse and traffic between their citizens and includes the transportation of persons and property and the navigation of public waters for that purpose."

In the Covington Bridge case the State of Kentucky attempted to regulate the polls to be collected by the bridge company on their bridge across the Ohio river to Ohio. This was held unconstitutional, the court holding that the traffic across the river was interstate commerce, as was in the Wabash and the Pickard case.

It will be readily seen that these cases are not authorities for this case, for in this case the regulation is directed toward the person transported, while in those cases the regulation was directed toward the carrier transported.

In this connection we urge that these cases were the grounds for decisions in U. S. *vs.* Warner, U. S. *vs.* Hoke, U. S. *vs.* Westman, in which this statute was held to be a constitutional exercise of the power given to Congress by the "commerce" clause. It is submitted that these cases are not authorities for this case. In fact, there are no direct authorities, but Congress has attempted to regulate the passengers, and that in view of the cases found in the cases cited above, that commercial intercourse is necessary, it cannot be held that pas-

sengers engaged in interstate travel are engaged in this kind of intercourse. The reason for having this commerce clause is stated in the case of Brown *vs.* Maryland, 12 Wheat., 419, 444, as:

> "The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests and our disunited efforts to counteract their restrictions were rendered impotent for want of combination. Congress indeed possessed the power to make but the inability of the Federal Government to enforce them had been so apparent as to render that power in a degree useless. Those who felt the injury arising from this state of things and those who were capable of estimating the influence of commerce on the prosperity of nations perceived the necessity of giving the control over this important subject to a single government."

Can it be said that the enforcement of the police power, easily appurtenant to States, was within the thoughts of the framers of the Constitution when they drew up the commerce provision?

VII.

A person sending a woman from one State to another for prostitution, debauchery, or any other immoral purpose cannot be said to be engaged in commerce, for she is not a subject of commerce.

The bringing of a woman or girl for immoral practice by means of a carrier into one State from another does not constitute commerce, inasmuch as the said woman or girl is not a subject of commerce and especially not when she is expected to be used for the depraved purposes specified in the act. It has been heretofore contended in this brief that such woman or girl, or the persons bringing them in, are not *per se* engaged in commerce by reason of the fact that they ride on a carrier's train from one State to another. It is now contended by appellant that if the act can be upheld at all it will be necessary to show that, when brought in for such depraved purpose, she, like a lottery ticket, has a certain value and possesses the other values of commercial property, and is then a subject of commerce. An analysis of all the cases decided upon this commerce clause shows that Congress was held to have power to legislate, and the States not to legislate, under this clause, whether because the legislation took hold of a subject of commerce or because it regulated the carrier of commerce. If Congress gets no power to legislate because a woman brought in for such purpose is not a subject of commerce the legislation must fall, for it is

not contended that this is a regulation of a carrier.

The Lottery case is an example of a decision in which it was held that Congress had power to act, because it regulated a subject of commerce; there a lottery ticket was held to be a subject of commerce, the court saying, Mr. Justice Harlan writing the opinion, at page 363:

> "We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who sell and buy them, that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce."

There must be some right or quality of property in a subject of traffic or commerce, for Mr. Justice Harlan, at page 354 of the Lottery case, uses these terms interchangeably. It must have some market value, or it must be sent to another person to be sold. This is recognized in the Lottery case and in Reid *vs.* State of Colorado, 187 U. S., 137, and it is said in the Lottery case about the Reid case, at page 358:

> "Such cattle may have, notwithstanding their condition, a value in money for some purposes."

A woman or girl has no market value; they are not slaves, and it is a rule of public policy that since the emancipation of slaves a price cannot legally be put on any human being. They are not the subjects of traffic, barter and sale, and so forth,

because they have no market value. In this connection, see the case of U. S. *vs.* Griffen, 42 Kentucky, 208, holding that the ingress and egress of the slave could not be regulated by Congress, as he was not a subject of commerce.

And this is also true; the act is very wide. It seemingly covers a case of concubinage where, of course, the woman or girl brought in for "immoral causes or debauchery" could have no market value, could not be the subject of barter and sale; therefore it could not be said that any one bringing such a concubine in was engaged in commerce. The case of U. S. *vs.* Bitty, 208 U. S., 393, holds that a statute prohibiting the bringing in of an alien woman for the purpose of "prostitution or for any other immoral purposes" embraces the bringing in of an alien that she may live with the defendant as his concubine. In these respects these two statutes are alike; it must be held that this statute embraces concubinage and it cannot possibly be held that the bringing of a woman into a State for concubinage is bringing in a subject of traffic for commerce.

VIII.

This act is invalid as being a regulation of an incident of commerce and not of commerce itself.

In the Trade-mark cases, 100 U. S., 82, 96, Mr. Justice Fuller, writing the opinion and laying down the rule by which statutes like the one herein are to be valid or invalid, says:

> "When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the States, or with the Indian tribes."

This act cannot stand this test, as it does not appear on its face that it is a regulation of commerce, but it is rather, even granting for the moment (which we do not grant) that passengers traveling on interstate trips are engaged in commerce, a regulation of the crimes appurtenant to such passengers; a regulation of the crimes pertaining to such passengers is a regulation of an incident of commerce which, under the decision of Hooper *vs.* California, 155 U. S., 648, 655, Congress cannot regulate, but is restricted to the commerce itself. In that case, which was one of the many cases laying down the well-established rule that life insurance policies are not regulated under the commerce clause, because the business of insur-

ance is not commerce, the court says, Mr. Justice White, page 655:

> "It ignores the real distinction upon which the general rule and its exceptions are based, and which consist in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude State control over many contracts purely domestic in their nature.
>
> "The business of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the perils of the sea."

This doctrine had been previously affirmed in the case of Paul *vs.* Virginia, 5 Wall., 168. It has been followed in a host of cases, notably N. Y. Life Ins. Co. *vs.* Cravens, 178 U. S., 389, when Mr. Justice McKenna, writing for the court, says, at page 409:

> "The making of such a contract is a mere incident of commercial intercourse."

The correctness of the doctrine has never been questioned by any Supreme Court decision, and it is contended by appellant that it is still the law.

Now, if it is true that a contract of insurance while appurtenant to "commercial intercourse" is only an incident thereof, and Congress, having power to regulate the thing as distinguished from the incident thereof, has no power to regulate it, is it not also true that while the intent or purpose of a passenger in interstate travel is appurtenant to his commercial intercourse, granting for the moment that it be such, it is only an understanding thereof, it is not the "commercial intercourse" which Congress has the power to regulate, but, as is said in the Hooper case, an incident thereof, the regulation of which is left to the States?

It is not a regulation of commerce; it appears to be a regulation of an intent or purpose; it appears to be an attempt to usurp criminal jurisdiction, and this is more apparent when the text has been examined and the results brought out. For this reason it is claimed the statute is unconstitutional, because it is plainly not a regulation of commerce, though designated as such; but it is a regulation of the crimes, intents and purposes pertaining to commerce, and the power to regulate these being reserved to the States, and Congress having no authority to do so, its attempted regulation is invalid. Moreover, how by any stretch of the imagination can it be said that the "buying of tickets" for a

prostitute, or a woman about to be induced to become one, is commerce? It is plainly nothing but a preliminary to commerce.

CONCLUSION.

For all these reasons it is respectfully urged the court hold the act in question unconstitutional and enter an order in conformity with the prayer in the petition.

Respectfully submitted,

BENJAMIN C. BACHRACH,
Attorney for John A. Johnson.

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Office Supreme Court, U. S.
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CLERK.

No. 842.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1912.

UNITED STATES OF AMERICA ex rel. JOHN A. JOHNSON,

Appellant,

vs.

LUMAN T. HOY,

Appellee.

MOTION TO ADMIT APPELLANT TO BAIL.

BENJAMIN C. BACHRACH,
Attorney for Appellant.

CHAMPLIN LAW PRINTING CO.

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Appellant,

vs.

LUMAN T. HOY,

Appellee.

MOTION TO ADMIT APPELLANT TO BAIL.

Now comes John A. Johnson, appellant, by his attorney, Benjamin C. Bachrach, and moves the court to admit the appellant to bail pending the hearing of the above entitled cause, and for grounds of the above motion assigns the following reasons:

1. The District Court of the United States for the Northern District of Illinois, Eastern Division, fixed the bail at Thirty Thousand Dollars ($30,000), and said bail is excessive.

2. The District Court of the United States aforesaid refused to accept a certificate of deposit for the sum of Thirty Thousand Dollars ($30,000), or Thirty Thousand Dollars ($30,000) cash, in lieu of bail.

3. The District Judge of said District Court stated in open court that he would not accept real estate sureties, whatever the amount tendered, if it appeared that said sureties were indemnified for signing said bond of appellant.

4. Said District Judge stated in open court that he would not accept a surety company upon the bond of appellant.

5. The Act of Congress, upon which the indictment is based, to-wit, the White Slave Traffic Act, is unconstitutional and invalid.

6. The appellant is a colored man, and for several weeks the newspapers in the City of Chicago have been publishing false and untrue reports concerning him, whereby he has been prejudiced in the eyes of the public to such an extent that he is unable to induce real estate owners to become surety for him upon his bond unless they are indemnified.

Benjamin C. Buckner

Attorney for John A. Johnson, Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 842.

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JOHN A. JOHNSON, APPELLANT,

vs.

LUMAN T. HOY, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

REPLY BRIEF FOR THE APPELLANT.

IN SUPPORT OF THE CONTENTION THAT WHERE A DEFENDANT IS INDICTED IN THE FEDERAL COURT FOR A VIOLATION OF A FEDERAL STATUTE WHICH HE CLAIMS TO BE UNCONSTITUTIONAL, IF IT APPEAR THAT HE IS UNABLE TO GIVE SECURITY FOR HIS APPEARANCE IN THE LOWER COURT, OR THAT REASONABLE BAIL IS DENIED HIM, HIS REMEDY IS BY HABEAS CORPUS BEFORE TRIAL. EX PARTE ROYALL, 117 U. S., 241, 250.

BENJAMIN C. BACHRACH,
Attorney for John A. Johnson.

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MAY IT PLEASE THE COURT:

The only reply by the Solicitor General to the argument by counsel for appellant, that the act under which he was indicted and kept in custody was and is unconstitutional is twofold:

First, that appellant is now at liberty (the Solicitor General shows this fact by calling

the court's attention to a copy of an affidavit printed in the appendix to the brief), and, second, that the remedy for appellant is by writ of error after trial and not by *habeas corpus* before trial. In the note at the bottom of page 2 of his brief, Solicitor General, on the question of the constitutionality of the White Slave Act, considers briefs filed in the following cases: Holke *et al. vs.* United States, No. 381; Anthanasaw *et al. vs.* U. S., No. 588; Harris *et al. vs.* United States, No. 602; Bennett *vs.* United States, No. 603.

For the sake of convenience, counsel for appellant takes up for discussion the matter of the right of appellant to have the constitutionality of the act determined upon *habeas corpus.*

I.

IT IS UNQUESTIONABLY WITHIN THE POWER OF THE SUPREME COURT OF THE UNITED STATES TO DISCHARGE A PERSON IMPRISONED UNDER AN UNCONSTITUTIONAL FEDERAL STATUTE UPON AN APPEAL FROM AN ORDER BY A DISTRICT JUDGE DENYING A WRIT OF HABEAS CORPUS.

In *Ex parte* Royall, 117 U. S., 241, 246, Mr. Justice Harlan at some length sets forth the statutes of the United States with reference to the writ of *habeas corpus* and clearly points out that the contention made in this paragraph is sound.

> "The grant to the circuit courts in sec. 751 of jurisdiction to issue writs of *habeas corpus,* is in language as broad as could well

be employed. While it is attended by the general condition, necessarily implied, that the authority conferred must be exercised agreeably to the principles and usages of law, the only express limitations imposed is, that the privilege of the writ shall not be enjoyed by—or, rather, that the courts and the judicial officers named, shall not have power to award the writ to—any prisoner in jail, except in specified cases, one of them being where he is alleged to be held in custody in violation of the Constitution. The latter class of cases was first distinctly provided for by the acts of February 5, 1867, ch. 28, 14 Stat. 385, which declares that the several courts of the United States, and the several justices and judges thereof within their respective jurisdictions, in addition to the authority then conferred by law, 'shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty of law of the United States.' Whether, therefore, the appellant is a prisoner in jail, within the meaning of sec. 753, or is restrained of his liberty by an officer of the law executing the process of a court of Virginia, in either case, it being alleged under oath that he is held in custody in violation of the Constitution, the circuit court has, by the express words of the statute, jurisdiction on *habeas corpus* to inquire into the cause for which he is restrained of his liberty, and to dispose of him 'as law and justice require.'

"It may be suggested that the State court is competent to decide whether the petitioner is or is not illegally restrained of his liberty; that the appropriate time for the

determination of that question is at the trial of the indictment; and that his detention for the purpose simply of securing his attendance at the trial ought not to be deemed an improper exercise by that court of its power to hear and decide the case. The first of these propositions is undoubtedly sound; for in Robb *vs.* Connolly, 111 U. S., 624, 637, it was held, upon full consideration, that 'a State court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation determine cases at law or in equity, arising under the Constitution and laws of the United States, or involving rights dependent upon such Constitution or laws;' and that 'upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them.' *But with respect to the other propositions, it is clear that, if the local statute under which Royall was indicted be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity. As was said in Ex parte Siebold,* 100 *U. S.*, 371, 376, *'An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.' So in Ex parte Yarbrough,* 110 *U. S.*, 651, 654, *it was said that if the statute prescribing the offense for which Yarbrough and his associates were convicted was void, the court*

which tried them was without jurisdiction, and they were entitled to be discharged. It would seem—whether reference be had to the act of 1867 or to existing statutory provisions—that it was the purpose of Congress to invest the courts of the Union, and the justices and judges thereof, with power upon writ of *habeas corpus,* to restore to liberty any person, within their respective jurisdictions, who is held in custody, by whatever authority, in violation of the Constitution or any law or treaty of the United States. The statute evidently contemplated that cases might arise when the power thus conferred should be exercised, during the progress of proceedings instituted against the petitioner in a State court, or by or under authority of a State, on account of the very matter presented for determination by the writ of *habeas corpus;* for care is taken to provide that any such proceedings, pending the hearing of the case upon the writ and until final judgment and after the prisoner is discharged, shall be null and void. If such were not the clear implication of the statute, still, as it does not except from its operation cases in which the applicant for the writ is held in custody by the authority of a State, acting through its judiciary or by its officers, the court could not, against the positive language of Congress declare any such exception, unless required to do so by the terms of the Constitution itself. But as the judicial power of the Nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of *habeas corpus* cannot be suspended unless when in cases of rebellion or invasion

the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States or in any department or officer thereof; no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union and of their justices and judges. That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the circuit court to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution. The grand jurors who found the indictment, the court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty, from the discharge of which the State could not release them, to respect and obey the supreme law of the land, 'Anything in the Constitution and laws of any State to the contrary notwithstanding.' And that equal power does not belong to the courts and judges of the several States; that they cannot, under any authority conferred by the States, discharge from custody persons held by authority of the courts of the United States or of commissioners of such courts, or by officers of the General Government acting under its laws, results from the supremacy of the Constitution and laws of the United States. Ableman *vs.* Booth, 21 How., 506; Tarble's case, 13 Wall., 397; Robb *vs.* Connolly, 111 U. S., 624.

"WE ARE, HOWEVER, OF OPINION THAT THE CIRCUIT COURT HAS JURISDICTION UPON WRIT OF HABEAS CORPUS TO INQUIRE INTO THE CAUSE OF APPELLANT'S COMMITMENT, AND TO DISCHARGE HIM, IF HE BE HELD IN CUSTODY IN VIOLATION OF THE CONSTITUTION."

II.

THE SUPREME COURT OF THE UNITED STATES HAS DISCRETION WHETHER IT WILL DISCHARGE THE PERSON WHO CLAIMS HE IS RESTRAINED OF HIS LIBERTY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES UPON HABEAS CORPUS IN ADVANCE OF HIS TRIAL IN THE COURT IN WHICH HE IS INDICTED, THAT DISCRETION, HOWEVER, TO BE SUBORDINATED TO ANY SPECIAL CIRCUMSTANCES REQUIRING IMMEDIATE ACTION.

In *Ex parte* Royall, 117 U. S., 250, Mr. Justice Harlan says:

> "It remains, however, to be considered, whether the refusal of that court to issue the writ and to take the accused from the custody of the State officer can be sustained upon any other ground than the one upon which it proceeded. If it can be, the judgment will not be reversed because an insufficient reason may have been assigned for the dismissal of the petitions.
>
> "Undoubtedly the writ should be forthwith awarded, 'unless it appears from the petition itself that the party is not entitled thereto,' and the case summarily heard and determined 'as law and justice require.' Such are the express requirements of the statute. If, however, it is apparent upon

the petition, that the writ if issued ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. *Ex parte* Watkins, 3 Pet., 193, 201; *Ex parte* Milligan, 4 Wall., 2, 111. What law and justice may require, in a particular case, is often an embarrassing question to the court or to the judicial officer before whom the petition is brought. It is alleged in the petitions—neither one of which, however, is accompanied by a copy of the indictment in the State court nor by any statement giving a reason why such a copy was not obtained—that the appellant is held in custody under process of a State court, in which he stands indicted for an alleged offense against the laws of Virginia. It is stated in one case that he gave bail, but was subsequently surrendered by his sureties. *But it is not alleged and it does not appear, in either case, that he is unable to give security for his appearance in the State court, or that reasonable bail is denied him, or that his trial will be unnecessarily delayed.* The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen, it is incompetent for the State court to pass. Under such circumstances, does the statute imperatively require the circuit court, by writ of *habeas corpus*, to wrest the petitioner from the custody of the State officers in advance of his trial in the State court? We are of opinion that while the circuit court has the power to do so, and may discharge

the accused in advance of his trial if he is restrained of his liberty in violation of the National Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. When the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the

commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under State authority. So, also, when they are in the custody of a State officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses. The present cases involve no such considerations. Nor do their circumstances, as detailed in the petitions, suggest any reason why the State court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The circuit court was not at liberty, under the circumstances disclosed, to presume that the decision of the State court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States. In Taylor *vs.* Carryl, 20 How., 583, 595, it was said to be a recognized portion of the duty of this court—and, we will add, of all other courts, National

and State—'to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations.' And in Covell *vs.* Hayman, 111 U. S., 176, 182, it was declared 'that the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity.'

"That these salutary principles may have full operation, and in harmony with what we suppose was the intention of Congress in the enactments in question, this court holds that where a person is in custody, under process from a State court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion, whether it will discharge him, upon *habeas corpus,* in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action.

When the State court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus,* summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States. The latter was substantially the course adopted in *Ex parte* Bridges, 2 Woods, 428. The prisoner was indicted and convicted in one of the courts of Georgia for perjury committed in an examination before a United States commissioner under what is known as the Enforcement Act of Congress. He was discharged upon *habeas corpus,* sued out before Mr. Justice Bradley, upon ground that the State court had no jurisdiction of the case, the offense charged being one which, under the laws of the United States, was exclusively cognizable in the Federal courts. *Adverting to the argument that where a defendant has been regularly indicted, tried, and convicted in a State court, his only remedy was to carry the judgment to the State court of last resort, and thence by writ of error, to this court, he said: 'This might be so if the proceeding in the State court was merely erroneous; but where it is void for want of jurisdiction, habeas corpus will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case. Ex parte Lange,* 18 Wall., 163.' It was further observed, in the same case, that while it might appear unseemly that a prisoner,

after conviction in a State court, should be set at liberty by a single judge on *habeas corpus*, there was no escape from the act of 1867, which invested such judge with power to discharge when the prisoner was restrained of his liberty in violation of a law of the United States.

"As it does not appear that the circuit court might not, in its discretion and consistently with law and justice, have denied the applications for the writ at the time they were made, we are of opinion that the judgment in each case must be affirmed, but without prejudice to the right of the petitioner to renew his applications to that court at some future time should the circumstances render it proper to do so."

In the case of Riggins *vs.* United States, 26 Sup. Ct. Rep., 149. Mr. Chief Justice Fuller says, "We discover no exceptional circumstances which demand our interposition in advance of adjudication by the court of the district upon the merits of the case before ther[illegible] And again on the same page, the learned jus[illegible] says, "There is nothing in this record that di[illegible]osed that there was any special circumstances which justified departure from the regular course of judicial procedure."

In the case of Minnesota *vs.* Brundage, 21 Sup. Ct. Rep., page 455, the court in the opinion points out cases attended by such circumstances which make it proper for the Supreme Court to review by *habeas corpus* an order denying the release of a person claiming to be imprisoned under an unconstitutional statute.

In the case of *In re* Chapman, 15 Sup. Ct. Rep., 331; 150 U. S., 211, Mr. Justice Fuller, in his opinion, cites with approval the principles discussed in the case of *Ex parte* Royall, 117 U. S., 241, and the doctrine is again asserted that when special circumstances arise this court will exercise its discretion in determining in advance of the trial the question of the constitutionality of the statute.

In the case of Glasgow *vs.* Moyer, 225 U. S., 420, after conviction and sentence, instead of sueing out writ of error petitioner filed writ of *habeas corpus* and this court adhered to its rule expressed in many cases, that the writ of *habeas corpus* cannot be made to perform the office of a writ of error.

Without reviewing all authorities cited by the learned Solicitor General, it is a fair statement to make to this court that nothing in any of the cases cited in any way militates against the position of appellant's counsel in this that the Supreme Court of the United States undoubtedly has the power to consider and determine the constitutionality of an act of Congress in advance of trial where the person claiming to be imprisoned under the unconstitutional statute files a petition for *habeas corpus*, which petition is denied by the district court, and further, as to whether or not the Supreme Court will issue the writ of *habeas corpus* in such a case or depend upon special circumstances which make the writ of *habeas corpus* the only remedy.

III.

THE CASE AT BAR UPON THE RECORD RECITES EXCEPTIONAL CIRCUMSTANCES WHICH DEMAND THE INTERPOSITION BY THIS COURT ON THE QUESTION OF THE CONSTITUTIONALITY OF THE ACT.

In the petition for *habeas corpus* it is alleged in the printed T. R.:

> "Your petitioner further shows that on November 7th, 1912, the Honorable Kenisaw M. Landis, one of the judges of said district court, entered an order in said court fixing bail on said indictment in the sum of thirty thousand dollars ($30,000); that on fendant tendered as surety one Tiny Johnson, the mother of your petitioner, as surety, for the appearance of your petitioner; and the said Tiny Johnson schedules real estate situated in Cook County, Illinois, unincumbered, the fair market value of said real estate exceeding the sum of thirty thousand dollars.
>
> "And in addition thereto your petitioner offered to deposit with the clerk of the court a certificate of deposit issued by the First National Bank of Chicago for the sum of fifteen thousand dollars ($15,000), and, if the court required, a certificate of deposit for the sum of thirty thousand dollars ($30,000), to be held by the clerk of the said district court, and to be declared forfeited in the event that your petitioner failed or neglected to comply with the terms of the recognizance for his appearance under the charge in the indictment above mentioned. Whereupon said Honorable Kenesaw M.

Landis, judge of the said district court, stated in open court, that he would not approve a cash bond for fifteen or thirty thousand dollars; that he would not accept a surety company upon the bond, or any owner of real estate, although such owner should schedule property sufficient as surety and if the owner of such real estate be indemnified.

"Your petitioner further shows that the amount of bail in this case is excessive; that the usual amount of the bail fixed in cases under the White Slave Traffic Act is five thousand dollars ($5,000); that the conditions made by the said Honorable Kenesaw M. Landis as to the kind of surety to be accepted by the court make it impossible for your petitioner to furnish the bail required in order to secure his liberty while awaiting trial on said indictment.

"Your petitioner further shows that he is ready and willing to deposit with the clerk of the court, either a certificate of deposit, or lawful money of the United States, in such sum as the court shall deem sufficient to secure the appearance of your petitioner.

"Your petitioner further alleges that he is a colored man, and that for several weeks last past the newspapers of the city of Chicago have been printing divers untrue articles of and concerning your petitioner, until there is now a wide-spread prejudice against your petitioner, and that this prejudice has grown to such an extent that unless your petitioner in some way indemnifies persons to sign bonds for the appearance of your petitioner, your petitioner will be unable to get owners of real estate to sign bonds for his appearance."

No return was made to the petition and the petition being sworn to, the statements therein contained must be taken as true. This court will readily see from the attitude taken by the judge of the district court on the matter of bail at the time the petition was presented and refused, it looked as though under the ruling of the judge of the district court that in the regular and ordinary course of procedure the appellant would be obliged to remain in jail possibly for several years until the matter could be brought up in the regular way by writ of error after conviction.

At the time the record of appeal was presented to this court the facts as stated in the petition for *habeas corpus* refused by the district court were true. Nothing had occurred to change that situation in any way, and surely under those circumstances the appellant had the right to have the matter of the constitutionality of the act under which he was imprisoned, passed upon by this court. Moreover, this court will take judicial notice that an application was made to this court to admit the appellant to bail on the 11th day of November, 1912, upon the records in this case; that the Solicitor General asked time to file a brief in opposition to said motion, and on the 13th day of November, 1912, he did file a brief in this court objecting to the admission of the appellant to bail, and on page 13 of that brief urges the court to hold that in the case at bar writ of *habeas corpus* cannot be used for the purpose sought in this case, and the attention of the court was called to the

cases of *In re* Chapman, 156 U. S., 211; *In re* Lancaster, 137 U. S., 393; *In re* Huntington, 137 U. S., 63; *Ex parte* Mersan, 119 U. S., 584; Riggins *vs.* United States, 199 U. S., 547; Glasgow, petitioner, 223 U. S., 709.

Furthermore, on November 18, 1912, a motion to advance this cause was made on behalf of appellant, the motion being courteously presented for counsel for appellant by the distinguished Solicitor General. Not having been present in the court on that day counsel for the appellant has not been informed and does not know whether any brief was filed by the Solicitor General in opposition to advancing this cause or not, but counsel for appellant has been informed that the Solicitor General did object to the motion to advance this cause.

In this connection it is respectfully submitted that any argument or claim by the Solicitor General that this case should not be heard on *habeas corpus*, that *habeas corpus* was not the proper remedy, should have been made whether in opposition to said motion to advance or on the motion to dismiss the appeal.

After waiting until this court has advanced this cause to be heard with four other cases assigned for January 6, involving the constitutionality of the same act, and never having before the time the brief in this case was filed, within a week of the time set for the hearing of the case, raised the question as to the right of the appellant to have this matter determined upon an appeal from the order denying writ of *habeas corpus*, it is respectfully submitted that the objection to having the case dis-

posed of on the constitutionality of the White Slave Traffic Act now comes too late. Besides, the decisions by this court on the constitutionality of the White Slave Act in the other four cases set for argument on the same day must necessarily control the disposition of this case.

IV.

THE FACT THAT THE APPELLANT HAS SINCE BEEN ADMITTED TO BAIL AND IS NOW AT LIBERTY, NOT HAVING BEEN RAISED BY PLEA OF RELEASE OF ERRORS BY SOLICITOR GENERAL NOR BY MOTION TO DISMISS, CANNOT BE RAISED BY COPY OF AFFIDAVIT PRINTED IN APPENDIX.

It nowhere appears in the record that on the 15th day of November, 1912, appellant in this case was admitted to bail, and the only information this court has on that subject comes from the brief of the Solicitor General and what purports to be a copy of an affidavit of the District Attorney of the Northern District of Illinois, printed in the appendix, which recites the fact of the admission to bail of appellant on November 15, 1912. This can hardly be regarded as the proper or approved method of calling the attention of the Supreme Court to a fact supposed to have occurred after the case had been brought to the Supreme Court of the United States.

At the time the record was filed in this court, appellant had not been admitted to bail, and if his admission to bail would change the status any,

which is not admitted, but denied by counsel for appellant, the proper way for the Solicitor General to have proceeded would have been to file a plea of release of errors, namely, a plea of *puis darrien* continuance, not set up the fact now referred to in the affidavit printed in the appendix of the brief.

In 1 Chitty Pl., p. 659, the following appears:

> "The Reg. Gen. Hil. T. 4 W. 4, reg. 2, puts an end to the entry of continuances, except the *juratur ponitur in respectu*, which is to be retained. But the same rule provides 'that in all cases in which a plea *puis darrien* continuance is now by law pleadable in bank, or at *nisi prius*, the same defense may be pleaded with an allegation that the matter arose after the last pleading or the issuing of the jury process, as the case may be.' *Provided* 'that no such plea shall be allowed unless accompanied by an affidavit that the matter thereof arose within 8 days next before the pleading of such pleas, or unless the court or a judge shall otherwise order.'"

And likewise, on page 737, among the Hilary rules, the following appears:

> "*Provided also*, That in all cases in which a plea *puis darrien* continuance is now by law pleadable *in banc* or at *nisi prius*, the same defense may be pleaded with an allegation that the matter arose after the last pleading, or the issuing of the jury process as the case may be."
>
> "*Provided also*, That no such plea shall be allowed unless accompanied by an affi-

davit that the matter thereof arose within 8 days next before the pleading of such pleas, or unless the court or a judge shall otherwise order."

Inasmuch as this court follows the common-law pleading generally, it is insisted that the Hilary rule stated is applicable.

But even if this court should be of opinion that the appeal might be dimissed upon motion made, it is respectfully contended that no motion was made up to the time of the hearing although ample opportunity had been given; that the rules provide for notice to be given, if such motion is to be made, to enable printed reply to the motion to be filed if desired. That not having been done, it is manifestly unfair at this late date to inject, just in advance of the oral argument, an issue of this kind, and last, but not least, at the time of the filing of petition for writ of *habeas corpus* and at the time of denial of petition of writ of *habeas corpus*, the appellant in this case was in custody, and at the time the record was filed in this cause on appeal the appellant was in custody, and his rights should be determined as of that time. Not having seen the brief of Government on the constitutionality of the act counsel for appellant cannot reply.

Respectfully submitted,

BENJAMIN C. BACHRACH,
Attorney for John A. Johnson.

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 842.

JOHN A. JOHNSON, *Appellant,*
v.
LUMAN T. HOY, UNITED STATES MARSHAL, ETC., *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEE IN OPPOSITION TO MOTION TO ADMIT APPELLANT TO BAIL.

STATEMENT.

Johnson was indicted for violation of the so-called White Slave Traffic Act of June 25, 1910, 36 Stat. 825, in the District Court of the United States for the Northern District of Illinois. He did not meet the requirements of the court (Landis, J.) as to bail, and thereupon filed a petition for a writ of *habeas corpus,* alleging the unconstitutionality of the act under which he was indicted and also attacking the action of the trial court as to bail.

The petition was denied, and an appeal taken to this court. As a decision in this case concerning the constitutionality of the White Slave Act can not be had for some time, Johnson desires this court to admit him to bail, thus indirectly accomplishing his release, which he was not able to do by direct application to the court before which the indictment was pending.

Johnson urges as grounds for admission to bail (1) that the amount fixed by the trial court was excessive; (2) that the court refused to accept a certificate of deposit in lieu of bail; (3) that the judge stated that he would not accept even real estate sureties if it appeared that such sureties were indemnified for signing the bond; (4) that the judge stated he would not accept a surety company as surety; and (5) that the act under which appellant was indicted is unconstitutional.

A telegram received from the United States Attorney at Chicago, Illinois, discloses facts which fully justify the action of the court in determining bail. It reads:

CHICAGO, ILL., *November 11, 1912.*

ATTORNEY GENERAL,

Washington, D. C.

In habeas corpus proceedings United States ex rel. Johnson against Marshal Hoy application for writ was denied by Judge Carpenter on Saturday and appeal taken by relator to Supreme Court. Grounds alleged in petition are rulings district judge as to bail and constitutionality of Mann act

under which relator has been indicted. Citation was served on Saturday. Understand that counsel for relator expects to make some kind of an application to Supreme Court today with reference to bail. I understand that according to rule thirty four custody of prisoner remains unchanged pending such appeal. No application to reduce amount of bail was made before district judge and judge declined to accept cash bail or bail in which surety was indemnified only after disclosures in his court showing that parties representing defendant had attempted to obtain his release upon absolutely worthless bail. One of sureties tendered committed flagrant perjury in his examination. Attention was called to fact that defendant had stated that it was his intention to leave this country on thirtieth of November, and this statement was not contradicted by either defendant or any of his counsel. In view of the situation court was entirely justified in the exercise of his discretion in requiring a bail bond with sureties whose sole interest in signing is to produce defendant for trial, Simmons case, forty seven Federal, five seventy five.

WILKERSON, *U. S. Attorney.*

ARGUMENT.

I.

At the very threshold of the case it may be stated that no special circumstances are alleged which would seem to justify a dealing with the case other

than under rule 34 of this court, which provides in the first paragraph thereof as follows:

> Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

In addition to this, it will be shown that the grounds upon which Johnson bases his motion to be admitted to bail are entirely devoid of merit.

II.

In response to the contention that $30,000 is excessive bail, we reply,

First, that the proper enforcement of the criminal law requires a large discretion to be vested in the trial court, which should not be interfered with except in plain cases of abuse.

Second, that since the second court (the one to whom the application for the writ was made) declined to interfere, there is added reason to think that there has been no abuse of discretion.

Third, it does not appear that Johnson made any application to the trial court to reduce the bail. If proper arguments had been presented to the trial court, it might have reduced the bail. This court should not assume, in the absence of an application to have the bail reduced, that the lower court would act arbitrarily in refusing to reduce the bail if a proper case were made. In *State ex rel. Milliet* v. *Aucoin, Recorder*, 47 La. Ann. 1677, Milliett asked the State Supreme Court to interfere to reduce the

amount of bail fixed by the lower court, the Recorder. But as no application to reduce had been made to the lower court, the Supreme Court declined to interfere. It was said:

> We have often held that where relief is sought here for some ruling in the lower court, in the exercise of supervisory jurisdiction, we will not entertain the application unless all remedies have been exhausted below.
>
> For excessive bail the injured party has a speedy remedy by simple motion before the Criminal Court which has jurisdiction of the case. It is in a position to hear testimony and to examine into the conditions which would entitle the party to a reduction of the amount fixed by the committing magistrate. Bunting vs. Brown, 13 Johns. 425; Cornelines vs. Beldens, 1 Wend. 107; 17 Mass. 116.

Fourth. That as violations of the White Slave Act are punishable by five years' imprisonment, or $5,000 fine, or both, and yet are not extraditable, a guilty offender might be quite willing to jump any small amount of bail so as to seek refuge in a foreign country, and thus avoid punishment for a crime which the public policy of this country denounces with a heavy penalty. The administration of the criminal law would be brought into disrepute if one committing such an infamous crime as that for which Johnson has been indicted could, by forfeiting even a considerable sum of money, escape to a place where he would be free from further prose-

cution. Thirty thousand dollars, while a large sum, is not excessive because it is obviously not prohibitory. The very fact that Johnson is willing to deposit cash to that amount is conclusive that the amount fixed is not excessive. The term "excessive," as used in the Constitution, means such sum as is practically prohibitory in amount; and in determining what is excessive or prohibitory, regard must be had in each case to the financial ability of the defendant, the gravity of the offense, and the punishment to be imposed.

Evidently Johnson himself has the financial ability, and so the point on which independent sureties hesitate must be that they fear he will leave the country. This shows the clearest sort of justification for the caution exercised by the court below.

In *State* v. *Aucoin, supra,* $20,000 had been fixed as the amount of the bail. The offense charged was wounding with intent to murder. The court said:

> The object of giving bond for one's appearance to answer an accusation is for the purpose of securing his attendance, and it should be in such an amount as to exact the utmost vigilance on the part of the sureties for the appearance to prevent a forfeiture of the bonds. The amount of the bond should bear a proportion to the gravity of the offence and to the ability of the accused to give it. What might be excessive bail in one case would not be in another. The amount exacted by the recorder would be

> large, probably excessive, if the relator is without means. For a man of wealth it would probably be reasonable. At any rate, we are not informed as to the ability of the relator to furnish the bond, and are not disposed to arbitrarily fix the amount, even were we inclined, in a proceeding of this kind, to assume jurisdiction.

See *In re Scott,* 38 Nebr. 502, where $70,000 bail in an embezzlement case, the defendant being a man of large means, was held not excessive. And in *United States* v. *Simmons,* 47 Fed. 575, an embezzlement case, the amount fixed was $50,000.

III.

In response to the complaint that the trial court refused to accept either a $30,000 certificate of deposit or $30,000 cash in lieu of bail, we reply that the Federal statutes do not provide for the acceptance of cash in lieu of bail. The court would have had no power whatever legally to accept cash in lieu of bail.

The Revised Statutes, sec. 1015, provide that—

> Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death.

But "bail," as used in that statute, does not mean a deposit of cash; it means an undertaking guaranteed by sureties that the defendant shall be produced at the proper time in court.

In *United States* v. *Ryder,* 110 U. S. 729, 736, the theory of bail in criminal cases as distinguished

from bail in civil cases is pointed out. The point was emphasized that the object of bail in criminal cases was to have sureties with motives to exert themselves in securing the appearance of the principal. If that is the object, or one of the objects, of bail, it would clearly be defeated by a mere deposit of cash.

In the case of *Reinhard* v. *City*, 49 Ohio St. 257, 267, the Supreme Court of Ohio, in dealing with the question of cash bail, said:

> Bail may be defined as a delivery of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to jail. To say nothing of its liability to abuse, the deposit of money with the officer, as security for the appearance of the accused, would not be so likely to secure the end proposed as that provided by the statute.
>
> In *Butler* v. *Foster*, 14 Ala. 323, it was held that a judicial officer, authorized to receive bail for the appearance of persons charged with criminal offenses, can not receive from the accused a sum of money *in lieu* of or as a substitute for bail, no such power being conferred by statute; and if so paid in, neither the state, nor the county, has any claim to it. See also *Columbus* v. *Dunnick*, 41 Ohio St. 602; *State* v. *Lazarre*, 12 La. Ann. 166; *United States* v. *Faw*, 1 Cranch C. C. 486.

IV.

Regarding the court's alleged refusal to accept real estate sureties where it appeared that the sureties were indemnified for signing the bond, reference may be made to the case of *United States* v. *Simmons*, 47 Fed. 575, 577, in which the Circuit Court of the United States for the Southern District of New York, in passing upon a similar point, said:

> When persons offering themselves as bail have entered into a contract of indemnity with the accused, they have endeavored to relieve themselves of responsibility for him. It is true that the contract of indemnity which they have secured will not be enforced by the courts, but nevertheless they have made themselves parties to such a contract, they stand before the court relying upon the performance of the contract of indemnity by the defendant, and by taking such a contract they have disclosed an intention to avoid, so far as in them lies, any pecuniary loss on their part, in case the accused should flee, and to deprive themselves of any motive for vigilance to prevent his flight. The possibility of flight by the defendant has been a subject of contemplation by them, and they have done all that they can do to enable him to flee without notice to them, and to relieve him from all sense of obligation towards them, to avoid making them responsible upon their recognizance.

The court refused such bail. While it is true that the defendant had been convicted, that fact does not distinguish the case in principle from the one now before the court.

In *United States* v. *Ryder*, 110 U. S. 729, 736, it was held that different principles applied to bail bonds in criminal cases from those that applied in civil cases, and that the surety upon the bail bond in a criminal case would not be allowed to be subrogated to the rights of the United States against the principal, because it would be against public policy to relieve the sureties from the motive to be diligent to produce the person of the offender. The court said:

> This may be more apparent when we consider the peculiar character and objects of bail in criminal cases as compared with the object and purpose of bail in civil cases. The object of bail in civil cases is, either directly or indirectly, to secure the payment of a debt, or other civil duty; whilst the object of bail in criminal cases is to secure the appearance of the principal before the court for the purposes of public justice. Payment by the bail in a civil case discharges the obligation of the principal to his creditor, and is only required to the extent of that obligation, whatever may be the penalty of the bond or recognizance; whilst payment by the bail of their recognizance in criminal cases, though it discharges the bail, does not discharge the obligations of the principal to appear in court; that ob-

ligation still remains, and the principal may at any time be retaken and brought into court. To enable the bail, however, to escape the payment of their recognizance by performing that which the recognizance bound them to do, the Government will lend them its aid in every proper way, by process and without process, to seize the person of the principal and compel his appearance. This is the kind of subrogation which exists in criminal cases, namely, subrogation to the means of enforcing the performance of the thing which the recognizance of bail is intended to secure the performance of, and not subrogation to the peculiar remedies which the Government may have for collecting the penalty; for this would be to aid the bail to get rid of their obligation, and to relieve them from the motive to exert themselves in securing the appearance of the principal. Subrogation to the latter remedies would clearly be against public policy by subverting, as far as it might prove effectual, the very object and purpose of the recognizance. It would be as though the government should say to the bail, "We will aid you to get the amount of your recognizance from the principal so that you may be relieved from your obligation to surrender him to justice." If payment of the recognizance operated as a satisfaction or composition of the crime, then the subrogation contended for might be free from this objection; for then the Government would be satisfied in regard to the principal matter intended to be secured.

V.

In response to the trial court's statement that it would not accept a surety company upon the bail bond, we reply,

That Johnson's petition and sixth assignment of error clearly show that the court refused such surety because of the fact that it was to be indemnified by Johnson.

In his petition, after calling attention to the alleged local prejudice which exists against him, Johnson states:

> * * * this prejudice has grown to such an extent that *unless your petitioner in some way indemnifies persons to sign bonds for the appearance of your petitioner*, your petitioner will be unable to get owners of real estate to sign bonds for his appearance.

In his sixth assignment of error Johnson states:

> The petitioner by the action of Judge Kenesaw M. Landis, Judge of the District Court in refusing to accept cash bond in the sum of $30,000 and any sureties to be indemnified for the signing of the petitioner's bond thereby deprived petitioner of the right to be enlarged on bail while said indictment against said petitioner is pending undetermined.

Read in the light of these facts, it is plain that the point urged by Johnson in his motion to be admitted to bail, which we are now considering, is without merit, as shown by the discussion under Point IV.

VI.

The alleged unconstitutionality of the White Slave Traffic Act has no bearing upon this application for bail. That goes to the merits of the case. A claim that the act under which he is indicted is unconstitutional does not entitled a defendant to bail. His right to bail depends on other considerations.

It is important just here, and it discloses the real sense of the situation created by this appeal, to consider the manner in which the Federal procedural system has been dealt with in this case in order to invoke the interference of this court in the matter of bail. The situation is entirely factitious. The ground of the jurisdiction of this court over the case could, of course, only be that a constitutional question is involved. The particular ground urged here is that the White Slave Traffic Act is unconstitutional. It may be admitted that theoretically such a question has been raised; but our point just here is that it has not been raised in an orderly fashion. The writ of *habeas corpus*, particularly when applied for in such circumstances and at such a stage in the proceedings as in this case, is no proper method of testing the constitutionality of an act of Congress. The orderly administration of justice requires that such a question should be determined on writ of error granted at the proper time. It is clear under the decisions of this court that the issuance of the writ of *habeas corpus* by the court below would

have been an abuse of authority, operating as a writ of error and subserving dilatory purposes. In applying this rule in *Riggins* v. *United States*, 199 U. S. 547, it was said:

> While special reasons may exist why this should be the rule in respect of proceedings in state courts, which are not applicable to cases in the courts of the United States, nevertheless we have frequently applied the same principle to such cases. *In re Chapman*, 156 U. S. 211; *In re Lancaster*, 137 U. S. 393; *In re Huntington*, 137 U. S. 63; *Ex parte Mirzan*, 119 U. S. 584 (pp. 549–550). * * *
>
> Defendant might have raised his objections to the indictment by motion to quash or otherwise. If the indictment were held good, as we are advised by the opinion of the Circuit Court it would have been, defendant would have pleaded and gone to trial, and might have been acquitted. If convicted, the remedy by writ of error was open to him.
>
> There is nothing in this record to disclose that there were any special circumstances which justified a departure from the regular course of judicial procedure. That departure is contrary to the views we have heretofore explicitly expressed, and if we acquiesce in this method of invoking our jurisdiction, we shall find ourselves obliged to decide questions in advance of final adjudication, contrary to the settled rule, and to many decisions we have heretofore announced upon the subject. (p. 551.)

At the last term of this court, in Matter of *J. Wesley Glasgow, petitioner*, 223 U. S. 709, a motion before trial for leave to file a petition for writ of *habeas corpus*, based on claims that the act of Congress under which the petitioner was indicted was invalid and that petitioner's constitutional rights had otherwise been violated, was denied in a *per curiam* decision, citing *Riggins* v. *United States*.

It is not shown in this case that the ground now urged to support the jurisdiction of this court, namely, the question of the validity of the White Slave Traffic Act, was urged in the trial court in a proper or orderly manner, either by demurrer or otherwise. And as no exceptional circumstances of public interest are shown to make it important for this court to assume jurisdiction at this stage in order to decide the constitutional point, it should be taken that the strong probability is that this appeal will eventually be dismissed. Since, then, the ultimate and basic ground of jurisdiction is so doubtful, it must be apparent that the real motive of this proceeding is simply to make an opportunity to raise this question as to bail, a question which in itself would be outside the scope of the jurisdiction of this court. This is particularly true since it is also probable that an application to stay the proceedings below pending the decision of this appeal would be denied. See *Swift et al.* v. *Hoy, United States Marshal*, where a motion for stay of criminal proceedings in the district court

in a similar case was denied by this court December 5, 1911. In short, the real sense of this proceeding is that by means of a device which lends an appearance, but entirely specious, of jurisdiction in this court, it is attempted to induce the court to interfere in a matter of which it could not otherwise take cognizance. And since so much has been shown to justify the court below in its exercise of discretion in this matter, nothing should be done to disturb the *status quo*.

VII.

Bearing in mind, as was said by this court in *Ex parte Milburn*, 9 Pet. 702, 709, that—

> A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offense, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment which the law ordains for his offense—

it is clear that under the facts herein disclosed the lower court was fully justified in the action it took, and the present motion of appellant should be denied.

See also *United States* v. *Barber*, 140 U. S. 164, 167.

WM. MARSHALL BULLITT,
Solicitor General.

NOVEMBER 13, 1912.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 842.

JOHN A. JOHNSON, *Appellant.*

v.

LUMAN T. HOY, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

On November 7, 1912, "Jack" Johnson was indicted in the District Court of the United States for the Northern District of Illinois (Eastern Division), for a violation of the White Slave Traffic Act, 36 Stat. 825 (R. 1). He was immediately arrested and his bail fixed at $30,000 (R. 3).

On November 9 he filed in the same court a petition for a writ of *habeas corpus*, which was denied (R. 6); to review which he took his appeal (R. 8).

The application for the *habeas corpus* was based on two grounds: (1) That the White Slave Act was un-

constitutional,[1] and (2) That the bail requirements were illegal; but as he has since been admitted to bail and is now at liberty (p. 9, *infra*) that feature may be disregarded as a moot question.

ARGUMENT.

This is one of those cases which should be summarily affirmed without any inquiry as to the constitutionality of the act of Congress under which the appellant was indicted and arrested.

Here is a man indicted in a Federal court, seeking release by *habeas corpus* in advance of trial, upon the ground that the statute (for the alleged violation of which he was indicted) is unconstitutional.

The writ of *habeas corpus* has no such function. It is no substitute for a writ of error even *after conviction;* and *a fortiori* it should not be used to release a man *before* trial. *Non constat* that he may be not acquitted.

The prior decisions of this court are conclusive of the question.

1. The District Court had jurisdiction both of the person of the defendant and also of the offense under the express terms of section 5 of the White Slave Traffic Act (36 Stat. 826; R. 2, 3). Therefore *habeas corpus* will not lie, as it is never available except

[1] Appellant's brief is wholly devoted to an attack on the constitutionality of the White Slave Act; and on that subject we refer to the brief for the United States filed in Hoke et al. *v.* U. S., No. 381; Athanasaw et. al. *v.* U. S., No. 588; Harris et. al. *v.* U. S., No. 602; and Bennett *v.* U. S., No. 603.

where the court is *without jurisdiction* (*Riggins* v. *United States*, 199 U. S. 547, 548).

2. But waiving the question of *power*, it is clear that the court properly denied the writ.

It has been repeatedly held that where a man was indicted in a Federal court for the violation of an act of Congress, which he attacked as unconstitutional, a writ of *habeas corpus* would not be granted before trial, but he must rely upon a writ of error after trial (*In re Chapman*, 156 U. S. 211, 215, 217; *Riggins* v. *United States*, 199 U. S. 547, 551; *In re Lancaster*, 137 U. S. 393; *Glasgow* v. *Moyer*, 225 U. S. 420, 427–429). Even after trial, *habeas corpus* will not lie (*In re Lincoln*, 202 U. S. 178, 182).

So, too, in the case of an indictment or conviction in a State court where the statute is claimed to be in conflict with the Federal Constitution, the remedy is by writ of error to the State court and not by *habeas corpus* (*Minnesota* v. *Brundage*, 180 U. S 499; *Bailey* v. *Alabama*, 211 U. S. 452; *Ex parte Royall*, 117 U. S. 241).

It would be a waste of time to review the authorities at length.

In the case of *Riggins* v. *United States*, 199 U. S. 547, the defendant was indicted in a Federal court for a violation of an act of Congress, was arrested, filed his petition in the United States Circuit Court for a writ of *habeas corpus*, which was issued; but upon the hearing the writ was discharged and the defendant remanded into custody. On appeal, although the lower court had discharged the writ, this

court held that even that much consideration of it was an improper practice; and it therefore reversed the judgment, with instructions to the Circuit Court to quash the writ and dismiss the petition. This court said (p. 548):

> It is settled that the writ of *habeas corpus* will not issue unless the court under whose warrant petitioner is held is without jurisdiction, and that it cannot be used merely to correct errors. Ordinarily the writ will not be granted when there is a remedy by writ of error or appeal, yet in rare and exceptional cases it may be issued, although such remedy exists. * * *.
>
> While special reasons may exist why this should be the rule in respect of proceedings in state courts, which are not applicable to cases in the courts of the United States, nevertheless we have frequently applied the same principle to such cases. *In re Chapman*, 156 U. S. 211; *In re Lancaster*, 137 U. S. 393; *In re Huntington*, 137 U. S. 63; *Ex parte Mirzan*, 119 U. S. 584.
>
> In Chapman's case we held that it was a judicious and salutary general rule not to interfere with proceedings pending in the courts of the District of Columbia or in the Circuit Courts of the United States in advance of their final determination. * * *.
>
> True, the present case is not one of the issue of the writ of *habeas corpus* in respect of confinement under state authority, nor of an application to this court for the writ, but is the case of custody taken under a capias issued on

an indictment returned in the District Court and removed to the Circuit Court, and an application to that court for the writ before defendant had been compelled to take any step in the cause.

Defendant might have raised his objections to the indictment by motion to quash or otherwise. If the indictment were held good, as we are advised by the opinion of the Circuit Court it would have been, defendant would have pleaded and gone to trial, and might have been acquitted. If convicted, the remedy by writ of error was open to him.

There is nothing in this record to disclose that there were any special circumstances which justified a departure from the regular course of judicial procedure. That departure is contrary to the views we have heretofore explicitly expressed, and if we acquiesce in this method of invoking our jurisdiction, we shall find ourselves obliged to decide questions in advance of final adjudication, contrary to the settled rule, and to many decisions we have heretofore announced upon the subject.

If we should affirm or reverse the final order in this case, we should recognize a proceeding below, which we would not ourselves have entertained; and we are not disposed to hold that this manner of testing such questions as are argued here ought to have been pursued.

In *Glasgow* v. *Moyer*, 225 U. S. 420, the defendant was tried and convicted for sending obscene matter through the mails. He filed a petition for a writ of *habeas corpus*, upon the ground that the statute under

which he was indicted was unconstitutional. The writ was denied; and on appeal the judgment was affirmed. This court said (p. 428):

> The writ of *habeas corpus* cannot be made to perform the office of a writ of error. This has been decided many times, and, indeed, was the ground upon which a petition of appellant for *habeas corpus* to this court, before his trial, was decided. It is true, as we have said, that the case had not then been tried, but the principle is as applicable and determinative after trial as before trial. This was decided in one of the cases cited.—*In re Lincoln*, 202 U. S. 178, which cited other cases to the same effect. Subsequent cases have made the principle especially pertinent to the case at bar. *Harlan* v. *McGourin* (218 U. S. 442) was an appeal from a judgment discharging a writ of *habeas corpus* petitioned for after conviction, and it was held that the writ could not be used for the purpose of proceedings in error but was confined to a determination whether the restraint of liberty was without authority of law. In other words, as it was said, "Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions." *Matter of Gregory*, 219 U. S. 210, was a writ of *habeas corpus* brought after conviction, and we said that we were not concerned with the question whether the information upon which the petitioner was prosecuted and convicted was sufficient or whether the case set forth in an agreed statement of facts constituted a crime—that is to say, whether the

court properly applied the law—if it be found that the court had jurisdiction to try the issues and to render judgment. And for this many cases were cited.

The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised, and its decision can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of *habeas corpus* cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.

We have already pointed out that appellant before his trial petitioned this court in *habeas corpus*, and that his petition was denied on the ground that his proper remedy was by writ of error after trial. * * *

Having remitted him to a writ of error as a remedy, it would be a contradiction of the ruling, he not having availed himself of the remedy, to permit him to prosecute *habeas corpus*. The ground of the decision was that there was an orderly procedure prescribed by law for him to pursue, in other words, to set up his defenses of fact and law, whether they attacked the indictment for insufficiency or the validity of the law under which it was found, and, if the decision was against him, test its correctness through the proper appellate tribunals. * * *

In the case at bar "Jack" Johnson has his complete remedy by demurrer, etc., in the District Court, where he can fully test the constitutionality of the White Slave Traffic Act. If convicted, his remedy is by writ of error.

This is a plain case of an indictment in a Federal court for a violation of a Federal statute and does not present any of those exceptional conditions which, as pointed out in *Ex parte Royall*, 117 U. S. 241, 251, might justify a careful consideration as to the advisability of the issuance of the writ where the petitioner was in custody of the State authorities for some act done in pursuance of a law of the United States or of a decree of a court thereof, or on account of some treaty with a foreign state involving the relations of the United States to foreign countries.

CONCLUSION.

The writ should be denied upon the authority of *Riggins* v. *United States*, 199 U. S. 547, 551, and *Glasgow* v. *Moyer*, 225 U. S. 420, 427–429.

WM. MARSHALL BULLITT,
Solicitor General.

DECEMBER 18, 1912.

APPENDIX.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

October Term, A. D. 1912.

No. 842.

JOHN A. JOHNSON, APPELLANT, v. LUMAN T. HOY, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS, APPELLEE.	Appeal from the District Court of the United States for the Northern District of Illinois.

James H. Wilkerson, being first duly sworn, says that he is the United States attorney for the Northern District of Illinois; that John A. Johnson, appellant, in the above-entitled cause, was on the 15th day of November, 1912, duly admitted to bail by the District Court of the United States for the Northern District of Illinois, Eastern Division, and that he is now at liberty under such bail; that his release under such bail was from his arrest under the indictment referred to in the writ of habeas corpus herein, which was an indictment returned by the grand jury for the Northern District of Illinois, Eastern Division, on November 7, 1912, charging said Johnson with a violation of the act of Congress approved June 25, 1910,

in force July 1, 1910, commonly called the White Slave Traffic Act, and a certified copy of the order of the court admitting said Johnson to bail is herewith attached and made a part thereof, marked "Exhibit 1."

JAMES H. WILKERSON.

Subscribed and sworn to before me this 17th day of December, A. D. 1912.

[SEAL.] WILLIAM A. SMALL.

EXHIBIT 1.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Friday, November 15, A. D. 1912.

Present, the Honorable George A. Carpenter, judge.

THE UNITED STATES
v.
JOHN A. JOHNSON. } 5066.

Comes John Arthur Johnson, the defendant herein, in his own proper person with the sureties on his appearance bond, and presents said bond to the court for approval, and it appearing that the same is regular in form, properly conditioned, for the penal sum fixed by the court, to wit, thirty thousand dollars, and that the sureties are sufficient and ample security therefor, it is ordered by the court that said bond be, and the same hereby is, approved.

I, T. C. MacMillan, clerk of said court, do hereby certify the above and foregoing to be a true copy from the record of an order made by said court on the 15th day of November, A. D. 1912.

Witness my hand and the seal of said court at Chicago this 17th day of December, A. D. 1912.

[SEAL.] T. C. MACMILLAN, *Clerk.*

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Friday, November 15, A. D. 1912.

Present, the Honorable George A. Carpenter, judge.

THE UNITED STATES
v. } 5073.
JOHN A. JOHNSON.

Come the parties by their attorneys, the defendant in his own proper person and the sureties on his appearance bond, and it appearing that said defendant has this day given bond in the penal sum of thirty thousand dollars, which has been duly approved and filed in cause No. 5066 conditioned for the appearance of said defendant in cases 5066, 5073, 5074, 5075, and 5076, it is ordered that he, the said John Arthur Johnson, be released from custody on said bond.

I, T. C. MacMillan, clerk of said court, do hereby certify the above and foregoing to be a true copy from the record of an order made by said court on the 15th day of November, A. D. 1912.

Witness my hand and the seal of said court, at Chicago, this 17th day of December, A. D. 1912.

[SEAL.] T. C. MACMILLAN, *Clerk*.

[Similar orders were entered in Nos. 5074, 5075, 5076.]

O

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 842.

JOHN A. JOHNSON

vs.

LUMAN T. HOY, U. S. MARSHAL, ETC.

VIEWS OF THE MINORITY OF COMMITTEE OF HOUSE OF REPRESENTATIVES (45 CONG. REC., PART I, PAGE 804).

The members of the minority, whose names are hereto subscribed, do not agree with the views of the majority on H. R. 12315, "To regulate and prevent the transportation in interstate commerce of alien women and girls for immoral purposes, and for other purposes."

The real correct analysis of this bill is that it proposes to turn over to the jurisdiction of Congress, under the pretense and guise of regulating commerce among the States, the authority to exercise police power that is inherent to and remains with the States. It is an attempt to exercise police authority by the General Government over those

things subject only to the police authority of the States. The police powers of the States of the Union are nothing more or less than the powers of government inherent in every State within its limits. It is the power to govern men and things and certainly to provide for the health and morals of the people and make laws for the punishment of crimes within its jurisdiction. Congress has no police power except in the District of Columbia and the Territories. If Congress has the power to do what this bill proposes, then "the door is open wide to the assumption by the National Government of an almost unlimited body of legislation which has heretofore been recognized as particularly within the jurisdiction of the States" (Gibbons *vs.* Ogden, 9 Wheat.; Passenger cases, 7 How., 283; United States *vs.* De Witt, 9 Wall.; Slaughter-house case, 16 Wall., and King *vs.* American Transfer Company, 14 Fed., 512).

In the case of Barbier *vs.* Conally (113 U. S., 27-31), the court says:

> "The power of States to impose restraint and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity is a power originally and always belonging to the States; not surrendered by them to the General Government nor directly restrained by the Constitution of the United States, and essentially exclusive."

The report of the majority does not controvert the authority of the State, under its inherent

police power, to prohibit vice and promote morality; to pass necessary laws for the protection of its citizens with reference thereto. If such power is inherent in and began with the life of the State, was never delegated to the Federal Government, and still remains with the State, and is "essentially exclusive," where, then, can Congress find authority in the Constitution, directly or indirectly, to legislate on a question of vice and morals as to interfere, restrain, or prescribe penalties relative to the practice of vice or immorality among or between citizens of the States? We contend that whenever the Federal Government assumes to exercise police power within the confines of a State on any subject exclusively within the jurisdiction of a State it invades the right of the State.

In License cases (5 How., 621), in discussing the police power of the States, the court say:

> "Where can such a power be safer lodged than with those public bodies or States, who are themselves to be the greatest sufferers in interest and character by the improper use of it. The States stand properly on their reserved rights within their own powers and sovereignty and judge of the expediency and wisdom of their own laws, and while they take care not to violate clearly any portion of the Constitution or statute of the General Government, our duty to that Constitution and law and our respect for State rights must require us not to interfere."

If the walls protecting the police powers of the States in their multitudinous character from their very nature, and which really lie at the foundation of social existence of the citizens of the States, are broken down, then ultimately the control of all matters of internal police will devolve on Congress.

In the Trade-Mark cases (100 U. S., 96), the court say:

> "When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law or from its essential nature that it is a regulation of commerce with foreign nations or among the States or with the Indian tribes."

It is chiefly and peculiarly by just such legislation as this bill proposes, under the plea of the reform of vice and morals, that Congress can establish a dangerous precedent that will gradually change our wise and successful Federal system to a consolidated government.

Immigration Laws.

The subject-matter of this bill is not new in congressional legislation. The first legislation of the Congress on the importation of women to our country for immoral purposes is found in the act of Congress of March 3, 1875. From that date to the present many valuable changes and additions

have been made by Congress strengthening our immigration laws and increasing their efficiency in debarring from our ports the objectionable class of alien women or girls, and for the deportation of those admitted to our ports contrary to law, and the punishment of all persons who aided or assisted in their unlawful entry. The efficiency of our Federal statutes appears to have brought good results within the true limit of Federal authority, because the traffic of alien women and girls for prostitution or other immoral purposes has practically been broken up, or certainly greatly decreased, and will, in a few years, totally disappear if our present immigration statutes are faithfully and vigorously enforced.

Hon. Edwin W. Sims, United States District Attorney for the Northern District of Illinois (Chicago), says, in a letter of February 3, 1909:

> "I think I may safely say that the prosecutions conducted have resulted in effectually breaking up the traffic in alien girls, at least in this district and for the time being."

The annual report of the Commissioner-General of Immigration, June 30, 1907, says:

> "There can be no denying the assertion that apparently and on the surface at least there has been in recent years a marked decrease in the nefarious business," etc.

In his annual report of 1908, the Commissioner-General of Immigration commends strongly existing laws, and says:

> "Fortunately the first case brought in the court to test its scope was carried up to the Supreme Court, and a decision sustaining the Government's contention of the broadest possible kind has been handed down." United States *vs.* John Bitty (208 U. S., 399).

This has all been accomplished under our immigration laws bearing on the suppression of the evil complained of. Our Supreme Court has wisely, in view of the promotion of morals and the suppression of vice, given a construction of the broadest possible kind to these statutes.

The true remedy within Federal authority is found in the present immigration statutes.

The jurisdiction of Congress in the importation of women and girls for immoral purposes is not controverted.

This bill is drastic and, in its inevitable results, revolutionary. Its provisions relative to the transportation of alien women and girls in foreign commerce and their admission to our ports are not controverted. Our chief objection to the bill is that, under the exclusive authority that the Congress has under the commerce clause of the Constitution to regulate, direct, and control commerce

among the States and foreign nations, that incidentally or otherwise, Congress cannot, in the exercise of police power, punish citizens of the States for violating a Federal statute made under the pretense of regulating morals and suppressing evils which in the strictest and most literal sense, along with the health, peace, and order, is an affair that belongs to the States; and the Federal Government never has and never can, under our existing Federal system, lawfully claim or exercise such power except in the District of Columbia and the Territories.

In the Federal Trade-Mark cases (100 U. S. 96) the Supreme Court of the United States says:

> "While bearing in mind the literal construction that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States."

Does this bill, in sections 2, 3, and 4, which apply to native women and girls and is disconnected with navigation or foreign commerce, regulate commerce between the individual citizens of the different States? Can any one claim that any ticket or tickets for transportation given to a native woman or girl by some citizen for any purpose whatever constitutes commerce between "individual citizens of different States?"

In the case of Hooper *vs.* California (15 S. Ct. Repts.), Mr. Justice White, delivering the opinion of the court, says:

> "If the power to regulate interstate commerce applied to all the incidents to which such commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States and would exclude State control from many contracts purely domestic in their nature."

Can it be conceived that the framers of our Constitution, when they delegated in behalf of the States to the Federal Government the authority "to regulate commerce with foreign nations and among the several States and with the Indian tribes," ever intended that such delegated powers could be so stretched as to give Congress the authority to usurp the internal police powers of a State?

International Agreement.

Section 6 of the bill applies exclusively to alien women and girls and is wholly connected with foreign commerce or navigation. This section is based on a certain agreement that our Government entered into with foreign governments to secure information on white-slave traffic. This section says, among other things:

"Every person who shall keep, maintain, control, support, or harbor in any house or place, for the purpose of prostitution or for any other immoral purpose, any alien woman or girl," etc.

upon the violation of certain stipulations therein shall be guilty of a misdemeanor. We contend that this provision in the bill is directly in conflict with the decision of the Supreme Court of the United States in Joseph Keller *vs.* The United States (213 U. S., 138), decided April 5, 1909.

The section 6 seeks to clothe the treaty-making power of our Government with unauthorized legislative authority. The provisions of section 6, together with the provisions of sections 2, 3, and 4, are fairly subject to the criticism of discrimination or class legislation. They provide different punishments for citizens or persons guilty of the same offense.

Section 6 provides that a citizen or a person in certain dealings with an alien woman or girl commits a misdemeanor, and on conviction shall be punished by a fine of not more than $2,000, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment, in the discretion of the court.

Sections 2 and 3: That any citizen or person who has certain dealings with a native woman or girl, by aiding or assisting her in going from one State to another, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a

fine not exceeding $5,000, or by imprisonment for not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Section 4 refers to American girls under 18 years of age, imposing a fine of not more than $10,000 and imprisonment for not exceeding ten years.

It certainly is not in harmony with the American idea of justice that the Federal statute should seize the citizen on account of his dealings with an alien woman or girl and punish him with a fine of $2,000 or imprisonment of not longer than two years, while a citizen who is convicted under sections 2 and 3 on account of transactions or dealings with native women or girls is fined not more than $5,000 and imprisonment for a term of not more than five years.

The bill ignores the admonition given by the Supreme Court of the United States when it said in the case of Houston *vs.* Moore (5 Wheat., 48):

> "nor ought any power to be cited, much less to be adjudged, in favor of the United States unless it be clearly within the reach of its constitutional charter."

The report of the majority indicates the great doubt that entered into the mind of the author of the report when he said:

> "Suggestions of the court contained in the opinion with reference to the conclusion the court might have reached had the facts been different," in the case of Keller *vs.* United States.

It is upon such a surmise, conjecture, or possibility that the Congress of the United States is gravely invited to assume authority in the affairs of the citizens of the United States and prescribe penalties for their punishment never exercised or claimed before. It is to be regretted that the assertion of these fundamental principles, Federal and State, arises in a matter relating to the life of degradation that follows the loss of virtue by a girl or woman, native or alien. Such a question necessarily involves the great principle of the extent of the authority of the Federal Government to exercise police jurisdiction within the limits of the States and to punish citizens who violate any Federal statute regulating the same. We assert that no incidents in the painful recitals that have been made to sustain this bill have come under our observation relative to objectionable conduct, especially from foreign commerce, that could not be reached and fully punished by State authority.

W. C. ADAMSON.
WILLIAM RICHARDSON.
C. L. BARTLETT.

VIEWS OF THE MINORITY OF SUBCOMMITTEE OF SENATE, 45TH CONGRESS (Rec., Part 8, Page 9037).

Mr. Heyburn, from the Committee on Immigration, submitted the following views of the minority:

The Committee on Immigration, to whom was referred the bill (H. R. 12315) to regulate and prevent the transportation in interstate and foreign commerce of alien women and girls for immoral purposes, and for other purposes, have carefully considered the same and submit the following report:

This bill proposes to regulate and control the immigration of

> "any woman or girl for the purpose of prostitution or debauchery or any other immoral purpose or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice."

And to make it unlawful to

> "knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining any ticket or tickets or other form of transportation, or any evidence of the right thereto to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District

of Columbia, in going to any place for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery or any other immoral practice whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia."

The bill then proceeds to provide that upon conviction the person shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding five years, or by both such fine and imprisonment in the discretion of the court. These are the provisions of section 2 of the bill. By the terms of section 1 the doing of all of these things enumerated in section 2 is defined as "interstate commerce," wherein transportation is from one State or Territory or the District of Columbia to any other State, Territory, or the District of Columbia, and by said section 1 it is further provided that such transportation from any State, Territory, or the District of Columbia shall be "foreign commerce."

The subcommittee is of the opinion that the acts enumerated in section 2 do not constitute interstate commerce, and that the declaration in section 1 that they shall be deemed to be interstate commerce does not constitute them such. It would not be held that a person who purchased a ticket

for a moral person starting upon a trip from one State to another was engaging in interstate commerce, so that the validity of section 2 must rest entirely upon the character or intent of the person who is to use the ticket. It would be intolerable that the person from whom they purchased a railroad ticket should inquire as to the morality or chastity of that person, and it is obvious that the intent of the person for whom the ticket was purchased existing in her mind before entering upon the journey, being subject to change at any point on the journey or after its completion, would be a very flimsy basis upon which to rest a criminal statute.

The word "knowingly," in line 1 of section 2, has relation only to the intent of the woman or girl to do the acts and things enumerated, and it would be a travesty upon legal procedure to hold that interstate commerce might be lawful or unlawful, according to the intent of the party paying the fare or the party receiving it, and if such a rule were held it would seem proper to fix some limit as to the degree of the offense, because it must be recognized that there are degrees in chastity and morality, and this bill does not attempt to discriminate between the grades of morality as a basis for the privilege of using the railroad trains and other mediums of travel from one State to another.

Section 2 makes the "person transporting the female" liable to the pains and penalties of the

act. Is that person the conductor of the train upon which she rides? If so, is he to inquire into the moral character of the females who ride upon the train? The thought of such a condition would be repulsive. In the first place, the traveling of females upon a railroad is not interstate commerce, neither is the purchase of a ticket for such a female by a person who does not accompany her interstate commerce, because it is not the purchaser of such ticket that transports a female. It is the public carrier. The courts will not hold that the purchase of a railroad ticket by one person for the benefit of another is interstate commerce, nor that Congress can make it so by so declaring. The subject dealt with in section 2 is one purely of police regulation, with which Congress may not deal except as to the District of Columbia or the Territories.

Section 3 deals with two distinct propositions. The first, that it shall be unlawful for any person "knowingly to persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or any other immoral purpose, whether with or without her consent."

With the exception of the phrase in line 5 of section 3, with reference to interstate or foreign

commerce, there is no statement in that portion of the section above quoted that deals with more than police regulation.

The second proposition stated in section 3 commences with the word "who," in line 10, and deals with the question of knowingly causing or assisting in causing a woman or girl to go and to be carried or transported as a passenger on the line or route of any common carrier in interstate or foreign commerce, and declares the same to be a felony. There is no element of interstate commerce in this statement of the offense.

Section 4 provides that

> "Any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of 18 years from any State or Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced, to engage in prostitution or debauchery, or any other immoral practice, or shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony."

The provisions of this section would make conversation interstate commerce. It would make the transportation of the female interstate commerce merely by force of the composition of the language connecting it with the fact that such person, pur-

suant to such conversation, rode upon a railroad in the furtherance of such purpose. There is no element of interstate commerce in this section.

Section 5 would seem to give the court jurisdiction over a party who advised or encouraged a female to ride upon a railroad to some point beyond the jurisdiction where a conversation took place for the purpose of engaging in immorality. Query: Would the person who had advised or had conversation with such woman be subject to punishment in any court in any district through which she might travel in pursuance of such conversation? The section would seem to bear out this suggestion.

Section 6 strikes the first sound proposition in the bill. It is legislation in aid of treaty between the United States and foreign governments for the purpose of making the treaty effective. A contract made abroad would be beyond the jurisdiction of Congress were it not for a treaty. The doubtful proposition in section 6 is that on page 5, commencing with line 23, which provides for the punishment of any person who shall "keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any country, which is a party to the treaty."

The word "knowingly" is omitted from this provision and it would be necessary that the par-

ties harboring such person should know at their peril the fact of the immigration and the period since it took place. This provision would not be justified under the terms of the treaty. It might be a subject of police regulation. The provisions of section 6 should be stated in the language of the treaty as nearly as possible. In the absence of a treaty it would not be within the power of Congress to enact such a section. It is therefore especially necessary that the language of the statute should not go beyond that of the treaty.

There can be no subject of legislative consideration more important to deal with than this. The question is not whether this traffic should be suppressed, but whether the enactment of such a measure as is proposed by this bill is within the power of Congress.

Section 3 of the act approved February 20, 1907, was intended to prevent the importation of females for immoral purposes. At the time of the enactment of that law treaties were being negotiated between civilized countries providing for co-operation in stamping out this evil, and such a treaty had been agreed to at Paris on May 18, 1904. It is true that this treaty was not ratified by the United States until June 6, 1908, and proclaimed on June 15 of that year. Yet Congress was anticipating the conditions that would exist when the treaty was in force. In the case of Keller *vs.* The United States, which was decided on May 5, 1909 (213 U. S., 138), the Supreme Court dealt with sec-

tion 3 of the act of February 20, 1907, which was enacted between the Paris agreement as to the treaty and its ratification.

The decision was rendered by Justice Brewer, who stated that the single question was one of constitutionality. He asked: "Has Congress power to punish the offenses charged, or is the jurisdiction thereof absolutely within the State?" He held that Congress has no power to enact section 3 of the act of February, 1907, to provide for the punishment of the person therein described as "whoever shall keep, maintain, control, support, or harbor in any house or other place for the purpose of prostitution or any other immoral purpose any alien woman or girl within three years after she shall have entered the United States shall in every such case be deemed guilty of felony, and on conviction thereof be imprisoned for not more than five years, or fined not more than $5,000."

In this case the judgment of the lower court was reversed by the Supreme Court and the reasoning of Mr. Justice Brewer covers the whole question. A dissenting opinion was filed, but that opinion is not material in that it did not establish the law.

Full authority of deportation is now vested by law in the department of the Government having charge of immigration, and your subcommittee can see no real necessity for further legislation other than that confined strictly to the carrying out of the treaty, and would recommend that all of section 1 after the enacting clause be stricken out,

and that sections 2, 3, 4, and 5 be stricken out; that section 6 be so amended as to confine it to the specific provisions of the treaty; that section 7 be retained in the bill; that section 5 precede section 7, and be amended so as only to give jurisdiction over the offenses in violation of the treaty to the proper United States district courts.

The orderly course of a trial should be pursued and usual remedies exhausted even where petitioner attacks the constitutionality of the act under which he is held. *Glasgow* v. *Moyer*, 225 U. S. 420.

Where petitioner bases his petition on the ground that excessive bail is required, and before decision on the writ furnishes the bail, as the court can only grant the same relief that the writ was intended to afford, the appeal from the judgment denying the writ must be dismissed.

THE facts are stated in the opinion.

Mr. Benjamin C. Bachrach for appellant.

Mr. Assistant Attorney General Harr, with whom *The Solicitor General* was on the brief, for appellee.

MR. JUSTICE LAMAR delivered the opinion of the court.

On November 7, 1912, Johnson was indicted for a violation of the White Slave Traffic Act (June 25, 1910, 36 Stat. 825, c. 395). He was arrested and the court fixed his bail at $30,000 but declined to accept as surety any one who was indemnified against loss, or to permit the defendant to deposit cash in lieu of bond. The defendant thereupon applied for a writ of *habeas corpus* on the ground (1) that excessive bail was required, on terms onerous and prohibitive, and (2) that the act under which he had been indicted was unconstitutional and void. After a hearing the petition was denied and he appealed to this court, where a motion was made that he be admitted to bail pending the hearing. This was resisted by the Solicitor General and, before a decision thereon, was abandoned. On appellant's motion the case was advanced to be heard with others involving the constitutionality of the same act. The defendant's counsel took part in the argument of that question, January 6, 1913. From an affidavit attached to the brief of the Government, submitted at that time, it ap-

pears that, on November 15, 1912, Johnson had given a bond, which had been approved by the district judge, and had been released from arrest under the indictment. The petitioner insists that the release on bail was known to the Government when the motion to advance was made, and not then having been urged he is now entitled to a decision on the constitutional question argued, so that if in his favor he would avoid re-arrest and trial.

The writ of *habeas corpus* is not intended to serve the office of a writ of error even after verdict, and, for still stronger reasons, it is not available to a defendant before trial, except in rare and exceptional cases as pointed out in *Ex parte Royall*, 117 U. S. 241. This is an effort to nullify that rule and to depart from the regular course of criminal proceedings by securing from this court, in advance, a decision on an issue of law which the defendant can raise in the District Court, with the right, if convicted, to a writ of error on any ruling adverse to his contention. That the orderly course of a trial must be pursued and the usual remedies exhausted, even where the petitioner attacks on *habeas corpus* the constitutionality of the statute under which he was indicted, was decided in *Glasgow* v. *Moyer*, 225 U. S. 420. That and other similar decisions have so definitely established the general principle as to leave no room for further discussion. *Riggins* v. *United States*, 199 U. S. 547.

It is claimed, however, that the defendant was required to give excessive bail, on prohibitive conditions, and that this fact, in connection with the attack on the validity of the statute, takes the case out of the general rule and brings it within the exceptional cases referred to in *Ex parte Royall*, 117 U. S. 241, so as to give petitioner the right to this hearing in advance of a trial. But even if it could be claimed that the facts relied on presented any reason for allowing him a hearing on the constitutionality of the act at this time, the defendant would not be entitled

to the benefit of the writ, because since the appeal he has given bond in the District Court and has been released from arrest under the warrant issued on the indictment. He is no longer in the custody of the marshal to whom the writ is addressed, and from whose custody he seeks to be discharged. The defendant is now at liberty, and having secured the very relief which the writ of *habeas corpus* was intended to afford to those held under warrants issued on indictments, the appeal must be

Dismissed.

JOHNSON *v.* HOY, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 842. Argued January 7, 8, 1913.—Decided February 3, 1913.

The writ of *habeas corpus* is not intended to serve the office of a writ of error even after verdict, and for stronger reasons is not available before trial except in rare and exceptional cases.